No. 73-1245

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

RICHARD V. BISCEGLIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States and B. L. Brutscher, a Special Agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the district court (Appendix A, *infra*, pp. 1a-5a) is unofficially reported at 72-1 U.S.T.C. par. 9474. The opinion of the court of appeals (Appendix B, *infra*, pp. 6a-22a) is reported at 486 F.2d 706.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, pp. 23a-24a) was entered on October 18, 1973. A timely petition for rehearing was denied on

November 16, 1973 (Appendix D, *infra*, p. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

STATUTES INVOLVED

Sections 7601 and 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7601 and 7602, in pertinent part provide:

> Section 7601(a). The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax * * *.
>
> Section 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * *.

STATEMENT

This case arises from the issuance of an internal revenue summons in the course of an investigation

into unusual currency transactions which suggested the possibility of an unpaid tax liability. The currency transactions involved the Commercial Bank of Middlesboro, Kentucky, of which respondent is the Vice-President.

In November 1970, the Commercial Bank had deposited $40,000 in badly deteriorated one hundred dollar bills with the Cincinnati Branch of the Federal Reserve Bank of Cleveland. The bills were "tissue paper thin" (Appendix B, *infra*, p. 7a), a condition apparently caused by a long period of storage, and they were no longer fit for circulation. In accordance with regular Federal Reserve procedures (31 C.F.R. (1972 ed.) 102), the Cincinnati Branch reported the receipt of these bills to the Internal Revenue Service.

Transactions involving large amounts of cash in high-denomination bills are unusual, and it is especially unusual for such bills to be badly worn. Thus the deposit made by the Commercial Bank was considerably out of the ordinary and suggested that substantial transactions may have taken place outside normal financial channels. This in turn suggested that the receipt of the bills, either by the Commercial Bank's depositor or by the Commercial Bank itself, may not have been properly reported for federal tax purposes.[1]

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[1] For example, the $40,000 could represent an amount hoarded by a decedent and not reported by his estate, or an amount illicitly received and not reported as income.

In order to determine whether any unpaid tax liability was associated with the currency deposited by the Commercial Bank, the Service initiated an investigation and issued a summons requesting respondent to testify and bring with him books and records which would provide information as to the person or persons who had deposited or otherwise transferred the bills to the Commercial Bank. The summons was issued "[i]n the matter of the tax liability of John Doe" because the identity of the potential taxpayer subject to investigation was of course unknown.

Respondent refused to testify or to produce the requested information, and the government filed a petition in the United States District Court for the Eastern District of Kentucky for enforcement of the summons. The district court modified the summons to limit the number and kind of records respondent would be required to produce, and ordered the summons enforced as modified.

The court of appeals reversed. The court held that Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, which empowers the Service to issue summonses, "presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding" (Appendix B, *infra*, p. 15a), and therefore that the Service has no statutory authority to issue a summons before it has discovered the identity of the particular person whose transactions it wishes to investigate.[2]

[2] Since it based the decision on statutory grounds, the court of appeals did not reach respondent's alternative contention that the summons constituted an unreasonable search in violation of the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

The court of appeals wrongly decided an issue of major importance to the conduct of federal tax investigations, and its decision conflicts with those of several other courts of appeals.

1. The court of appeals' confinement of the Secretary's summons power to cases where there has been prior identification of a particular taxpayer has no basis in either the statutory text or in tax enforcement policy.

Section 7602 of the Code empowers the Secretary to issue summonses for the broad purposes "of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability." Nothing in the statute requires the narrow reading given it by the court below. To the contrary, the summons power is broadly phrased, in a manner designed to encourage liberal construction. The blanket references to "any return," "any person," and "any such liability" strongly suggest that the Secretary's authority is not conditioned upon prior identification of a particular "return," "person," or "liability." Furthermore, "making a return where none has been made" may frequently entail investigation of transactions involving persons who, by virtue of the fact that they have failed to file a return, are unknown to the Service at

the time the investigation is begun. The court of appeals' constrictive interpretation thus frustrates one of the specific purposes explicitly set forth in the statute.

The decision below is also more broadly inconsistent with the underlying statutory scheme. Section 7602 should be read as empowering the Secretary to discharge fully his affirmative and wide-ranging duty, imposed by Section 7601, to canvass "each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." See *Donaldson* v. *United States*, 400 U.S. 517, 523. The summons in this case was issued in furtherance of a legitimate investigation undertaken pursuant to Section 7601. In refusing enforcement on the ground that a particular taxpayer had not yet been identified, the court below placed an artificial restriction, found nowhere in the statute, on the Secretary's ability to carry out his statutory enforcement responsibilities. Indeed, it is difficult to understand how the court expects the Secretary to ascertain the identity of the taxpayer in situations such as the one presented here, if his broad investigatory tool—the internal revenue summons—is not available for that purpose.

Moreover, no useful purpose would be served by limiting the summons power to situations where the taxpayer has already been identified. Throughout its opinion, the court below indirectly evinced concern that enforcement of "John Doe" summonses might open the way to fishing expeditions or dragnet in-

vestigations.[3] But this Court in *Donaldson* v. *United States*, *supra*, *United States* v. *Powell*, 379 U.S. 48, and *Reisman* v. *Caplin*, 375 U.S. 440, has set forth rules which furnish ample protection against such abuses. No further valid interest is protected by treating "John Doe" summonses as abusive *per se*.

2. These considerations have led other courts of appeals to uphold enforcement of the type of summons issued here. See *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7); *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Berkowitz*, C.A. 3, No. 73-1360, decided December 10, 1973; *United States* v. *Carter*, C.A. 5, No. 73-1414, decided December 26, 1973.[4]

The *Tillotson* case involved a summons requesting a lawyer to testify concerning the identity of the client

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[3] Thus the court principally relied upon decisions refusing enforcement of summonses on the grounds of materiality (*McDonough* v. *Lambert*, 94 F. 2d 838 (C.A. 1)) or overbreadth (*Local 174* v. *United States*, 240 F. 2d 387 (C.A. 9), and *First National Bank of Mobile* v. *United States*, 160 F. 2d 532 (C.A. 5)). Those decisions are irrelevant to the question of statutory authority raised here.

[4] Another panel of the Fifth Circuit has affirmed a district court's refusal to enforce a summons issued in connection with an investigation into the liability of an unidentified person, on the ground that such an investigation constitutes nothing more than a "research project." *United States* v. *Humble Oil & Refining Co.*, No. 72-3029, decided January 18, 1974. Since this decision appears to conflict in principle with *Carter*, the government intends to file a petition for rehearing with suggestion of rehearing *en banc* in order to give the Fifth Circuit an opportunity to resolve this internal conflict.

or clients on whose behalf he had made an anonymous payment to the Internal Revenue Service. In upholding enforcement of the summons, the Seventh Circuit expressly rejected (333 F. 2d at 516) the argument "that only an investigation of a taxpayer whose identity is known is authorized." The court below purported to distinguish *Tillotson* on the ground that the summons in that case was issued to assist in determining a specific taxpayer's liability whereas the summons here requests "examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation" (Appendix B, *infra*, p. 22a). We do not understand what the court intended by that distinction. In both *Tillotson* and the instant case, the identity of the person subject to investigation was unknown; and the person whose identity is being sought here—the transferor of the one hundred dollar bills—is no less "specific" than the unidentified client in *Tillotson*. The court's distinction of *Tillotson* is thus factually unpersuasive and cannot in any event be squared with the court's broad declaration that Section 7602 "presupposes that the IRS has already identified the person in whom it is interested" (Appendix B, *infra*, p. 15a).

The other "John Doe" summons cases—*Theodore*, *Turner*, *Berkowitz*, and *Carter*—involve enforcement of summonses issued to tax preparers seeking the identities of, and other information concerning, the preparer's clients. The court below made no attempt

to distinguish this line of cases.[5] Although these cases are of course factually distinguishable from *Tillotson* and the instant case, like *Tillotson* they stand for the general principle, rejected by the court below, that the Service has statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

3. The issue raised here is of great importance to the effective administration of the internal revenue laws. The Service has a duty to see that all federal taxes due are reported and paid, and in carrying out this responsibility it commonly investigates transactions which suggest the possible existence of an unreported tax liability. Such investigations are a legitimate and necessary supplement to the routine examination of returns, and they frequently must proceed without a prior determination of the identity of the person or persons who may be liable for additional taxes. Indeed, that identity is often most easily ascertained through use of the summons power.

In many ways the instant case is typical of such investigations. For years the Service has investigated suspicious currency transactions reported by the Federal Reserve. For example, during the two-year period 1957-1958, the Service completed 129 fraud investigations, resulting in the assessment of

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[5] The court discussed only *Theodore*, which it apparently read as refusing to enforce a "John Doe" summons. The court in *Theodore* did hold that the scope of the summons there was too broad, but it further held that the Service was entitled to production of a list of the preparer's clients' names and Social Security numbers (479 F. 2d at 755).

$13,500,000 in taxes and penalties, which were initiated on the basis of Federal Reserve reports. Treas. Release No. A-590, 1959 CCH Stand. Fed. Tax Rep., par. 6598 (August 3, 1959).[6] Such investigations frequently involve the issuance of "John Doe" summonses.

Tax preparers are currently the focus of another nationwide enforcement effort which commonly entails the issuance of "John Doe" summonses. This effort has of course given rise to the *Theodore-Turner-Berkowitz-Carter* line of cases. The Service is now conducting several other investigatory programs of similar scope. The decision below jeopardizes these special enforcement programs and will also adversely affect many ordinary investigations into suspected tax abuse.

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[6] In recognition that such reports serve the purpose of "provid[ing] law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime" (S. Rep. No. 91-1139, 91st Cong., 2d Sess. 1), Congress enacted the long-standing Federal Reserve reporting requirements (31 C.F.R. (1972 ed.) 102) as Section 231 of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 1101. See *Shultz* v. *California Bankers' Association*, No. 72-1073, argued January 16, 1974.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LONDON

No. 1996

[Filed Jun. 1, 1972]

UNITED STATES OF AMERICA and B. L. BRUTSCHER,
Special Agent, Internal Revenue Service,
PETITIONER

vs

RICHARD V. BISCEGLIA, as Vice President of the
Commercial Bank, Middlesboro, Kentucky,
RESPONDENT

MEMORANDUM OPINION

* * * *

This is an action brought pursuant to the provisions of 26 U.S.C. § 7604 for the enforcement of an Internal Revenue summons issued under the provisions of 26 U.S.C. § 7602. The summons in question was issued by petitioner Brutscher and directs the respondent to appear before him and to produce for inspection:

> "Those books and records which will provide information as to the person(s) or firm(s) which deposited, redeamed [*sic*] or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to

the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 16, 1970."

The respondent declined to comply with the summons and this action followed. The parties have filed memoranda directed to their respective legal contentions and have offered proof, at an evidentiary hearing, concerning their respective factual contentions.

The government is basically contending that the Commercial Bank transmitted, on November 6, 1970, and again on November 16, 1970, shipments of currency, each containing the sum of $20,000.00 in badly deteriorated one hundred dollar bills, to the Cincinnati Branch of the Federal Reserve Bank; that these transactions did not represent ordinary banking activities of the Commercial Bank; that enforcement of the subject summons is necessary to enable petitioner Brutscher to determine what taxes, if any, may be owing the Internal Revenue Service on the currency involved in the aforesaid transactions; and that the Commercial Bank has no standing to question the legality of the subject summons. The bank, on the other hand, is contending that it has standing to question the legality of the summons; that the summons is overly broad and is unreasonable under the circumstances; and that the summons represents an improper effort to gather evidence in a criminal investigation.

In *Reisman* v. *Caplin*, 375 U.S. 440 (1964), the court, speaking of proceedings under 26 U.S.C. § 7604, stated at page 449:

"Furthermore, we hold that in any of these procedures either before the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground."

Following that rule, the court in *United States* v. *Michigan Bell Telephone Company*, 415 F.2d 1284 (6th Cir. 1969), recognized the right of a witness other than the taxpayer whose activities were under investigation to challenge the lawfulness of an Internal Revenue summons. Thus, it seems clear that the Commercial Bank has standing to question the lawfulness of the subject summons.

In *United States* v. *Michigan Bell Telephone Company, supra*, the court recognized, however, that an Internal Revenue summons may be utilized as a part of an investigation having both civil and criminal overtones, even if the principal purpose of the summons is to investigate for criminal liability. Hence, it appears that the respondents contention in this regard is without merit.

Granting the propriety of the use of an administrative summons as a part of the instant investigation, the Court must nevertheless resolve the questions inherent as to the permissible limits of such a summons directed to the Commercial Bank or its officers. As further noted by the court in *United States* v. *Michigan Bell Telephone Company, supra*, an Internal Revenue summons will not be enforced where to do so would abuse the process of the court. Similarly, the Government is not entitled to go through the records of a banking institution as a

fishing expedition, and an administrative summons must, therefore, identify with some precision the documents to be produced thereunder. *United States* v. *Dauphin Deposit Trust Company*, 385 F.2d 129 (3rd Cir. 1967), cert. denied, 390 U.S. 921. The Government must also show a genuine nexus between the material sought and the matter under investigation, and the courts will not require a third party to reveal the affairs of one other than the taxpayer under investigation except upon the showing of a relationship between said affairs and the affairs of the involved taxpayer. *First National Bank of Mobile* v. *United States*, 160 F.2d 532 (5th Cir. 1947); *United States* v. *Harrington*, 388 F.2d 520 (2nd Cir. 1968). Finally, the burden to be imposed by an administrative summons upon a witness other than a taxpayer must be commensurate with the investigation at hand, and the courts will not enforce a summons which would result in unwarranted hardship on the witness. *United States* v. *First National Bank of Fort Smith, Arkansas*, 173 F.Supp. 716 (W. D. Ark. 1959).

Summarizing the foregoing principles in terms of the instant case, enforcement of the subject summons is proper to the extent of requiring the bank to produce those records which may be reasonably expected to relate to the investigation at hand, in a manner least burdensome to the bank and least calculated to unnecessarily reveal the affairs of the bank's customers whose transactions are not related to said investigation. At the hearing held in connection with

this matter, the respondent testified that if the bank received the subject currency in a cash for cash exchange, there would be no record of the transaction. He further testified that if the bank took the subject currency as a deposit, the transaction would be reflected by a cash ticket, which would indicate the teller but not the depositor, and by a deposit ticket, which would indicate both the teller who took the deposit and the person or persons making the deposit.

In the opinion of the Court, the legitimate ends of the subject summons could be reasonably served by requiring the bank to produce copies of, or to produce for copying, those of its deposit tickets reflecting cash deposits in the amount of $20,000.00 during the period from October 16, 1970, through November 16, 1970, plus those of its deposit tickets reflecting (if such information is revealed by the tickets) cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period. Accordingly, an Order will be this day entered directing the respondent to make such production within 30 days. To that extent the petition for enforcement will be granted and said petition will be otherwise denied.

The Court feels compelled to observe that this matter could be obviated by an interrogation, under oath, of the bank's various officers and tellers.

This 1st day of June, 1972.

/s/ Bernard T. Moynahan, Jr.
BERNARD T. MOYNAHAN, JR.
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank, Middlesboro, Kentucky,
RESPONDENT-APPELLANT

v.

UNITED STATES OF AMERICA and B. L. BRUTSCHER, Special Agent, Internal Revenue Service,
PETITIONERS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed October 18, 1973

Before: MCCREE and LIVELY, Circuit Judges, and KENNEDY,* District Judge.

MCCREE, Circuit Judge. This appeal requires us to determine whether the Internal Revenue Service may use a civil summons to compel a third party to produce for examination records pertaining to the financial affairs of unspecified and unidentified persons and organizations for the purpose of ascertaining their identities. We hold that it may not.

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* The Honorable Cornelia G. Kennedy, United States District Judge for the Eastern District of Michigan, sitting by designation.

The facts of the case are not disputed. On November 6, 1970, and on November 16, 1970, the Cincinnati branch of the Federal Reserve Bank of Cleveland received deposits of currency from the Commercial Bank of Middlesboro, Kentucky. Each deposit included $20,000 in one-hundred dollar bills which were "tissue paper thin" and in such a badly deteriorated condition that they were no longer fit for circulation. (Appendix at 22) Accordingly, the Cincinnati Branch of the Federal Reserve Bank destroyed them.

Apparently pursuant to federal reporting requirements,[1] the Cincinnati branch of the Federal Reserve

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[1] In their briefs, both parties refer to a Form TCR-1 a copy of which was filed by the Cincinnati branch of the Federal Reserve Bank with the IRS. This form, found on page 20 of the Appendix, and entitled "Report of Currency Transaction" requires three primary kinds of information: (1) the name, address, and business, occupation or profession of the person or organization initiating the transactions reported; (2) a description of the transactions reported, that is, the total amount of the currency involved, the amount of denominations of $100 or higher, and whether the transaction was a deposit, withdrawal, or exchange of currency, or the cashing or purchasing of a check; and (3) the name and address of the financial institution reporting. The obligation of financial institutions to provide this information is imposed by 31 C.F.R. §§ 102.1-4. (1972) (Instructions Relating to Reports of Currency Transactions). This regulation provides:

> § 102.1 Reports of currency transactions required.
>
> Commencing with transactions occurring in the month of August 1959, every financial institution in the United States shall file monthly reports on Form TCR-1 concerning each deposit or withdrawal, or other payment or transfer, effected by, through, or to such financial

Bank reported these deposits to the Internal Revenue Service (IRS). The report informed the IRS of the "deteriorated condition" of the bills "apparently [resulting] from [a] long period of storage." [2]

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institution, which involves transactions in United States currency as follows:

(a) Transactions involving $2,500 or more of United States currency in denominations of $100 or higher;

(b) Transactions involving $10,000 or more of United States currency in any denominations, and

(c) Transactions involving any amount in any denominations,

which in the judgment of the financial institution exceed those commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.

§ 102.2 Filing of reports.

Reports on Form TCR-1 shall be filed on or before the 15th day of the month following that in which the reported transactions occur, with the Federal Reserve Bank of the district in which the reporting financial institution is located. All information called for in such form shall be furnished. A supply of Form TRC-1 may be obtained upon request directed to any Federal Reserve Bank.

§ 102.3 Identification required.

No financial institution shall effect any transaction with respect to which a report is required unless the person or organizations with whom such transaction is to be effected has been satisfactorily identified.

§ 102.4 Definitions.

As used in this part "payment or transfer" shall include exchange of currency; and "financial institutions" shall mean banks, trust companies, savings banks, private bankers, investment bankers, building and loan associations, securities and commodities brokers, and currency exchanges and other persons or organizations engaged primarily in cashing and exchanging currency.

It appears that this regulation did not require the Cincinnati branch of the Federal Reserve Bank to file the Form TCR-1 exhibited in the Appendix. It does appear, however, that this regulation required the Commercial Bank in this case to file a Form TCR-1 in which, of course, the information sought by the IRS in this proceeding would have been disclosed.

It should also be noted that after the events that are the subject of this litigation had transpired, the Currency and Foreign Transactions Reporting Act of 1970, 31 U.S.C. §§ 1051 et seq. (Supp. 1973), became effective. This Act requires similar disclosures by financial institutions. A part of this Act and a regulation promulgated thereunder requiring domestic financial institutions to report any currency transaction with any customer involving more than $10,000 has been declared unconstitutional. *Stark* v. *Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972) (appeal pending).

[2] At the hearing before the United States District Court, the employee of the Federal Reserve Bank who had noticed the deteriorated condition of the bills deposited by the Commercial Bank testified that to the best of his knowledge, "there was only one parallel situation and that was several years ago where a large hoard of money was found that was in comparable condition. It was stored in milk cans that were buried in concrete."

The Intelligence Division of the IRS, suspecting that this money may not have been properly reported for income tax purposes by the person or persons who had transferred it to the Commercial Bank, assigned Special Agent B. L. Brutscher to investigate possible criminal violations of the tax laws. During his investigation, Brutscher, allegedly pursuant to

section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1967),[3] caused a summons, "In the matter

[3] 26 U.S.C. § 7602 (1967), "Examination of books and witnesses," provides:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

The IRS has also argued on appeal that 26 U.S.C. § 7601 (1967) authorizes the issuance and the enforcement of its summons in this case. That section provides:

> Canvass of districts for taxable persons and objects
>
> (a) General rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

of the tax liability of John Doe," served on Richard V. Bisceglia, vice president of the Commercial Bank, requesting that he testify and bring with him

> [t]hose books and records which will provide information as to the person(s) or firm(s) which deposited, redeemed or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 15, 1970.

When Bisceglia refused to comply with the summons, Special Agent Brutscher, pursuant to sections 7402(b) and 7604(a) of the Internal Revenue Code, 26 U.S.C. §§ 7402(b), 7604(a) (1967),[4] filed a peti-

Section 7601, however, merely "flatly imposes upon the Secretary the duty to canvass and inquire." *Donaldson* v. *United States*, 400 U.S. 517, 523 (1971). Accordingly, we do not believe that Congress intended to provide in this section grounds additional to those specified in section 7602 for the issuance of a summons.

[4] 26 U.S.C. § 7402(b) (1967), conferring jurisdiction upon the United States District Courts, provides:

> (b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce boks, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by ap-

tion in United States District Court to enforce the summons. At the hearing on the petition, evidence was adduced showing that it was unusual for the Commercial Bank to deposit with the Federal Reserve Bank so large an amount of money of one hundred dollar denominations and so large a number of bills in such a deteriorated condition. Although the IRS thought that there might be tax liability for 1970 because it appeared that someone might have been hoarding money for a considerable period of time in an unusual storage place, the IRS admitted that it neither suspected nor was it investigating a particular person or taxpayer. Instead, the purpose of the summons was to ascertain the identity of that person or those persons who had transferred the deteriorated bills to the Commercial Bank and then to determine whether anyone was liable for income taxes. Bisceglia testified that the bank had both cash and deposit tickets for the period in question. He explained, however, that only deposit tickets disclose the identity of a person making a deposit. Cash tickets show

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propriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. § 7604(a) (1967), relating to the enforcement of summons, provides:

> (a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

only the amount of cash deposited and the identity of the teller who received the deposit. He also informed the court that the bank keeps no records of exchange transactions, that is, transactions in which an individual exchanges his currency for new currency or for currency of different denominations.

In opposition to the enforcement of the summons, Bisceglia urged four affirmative defenses: (1) the summons was neither authorized by section 7602 of the Internal Revenue Code nor was it valid under the Fourth Amendment because it failed to specify the identity of the taxpayer being investigated; (2) a section 7602 civil summons was improper because the dominant purpose of the investigation was criminal; (3) the general nature of the summons made it impossible and impracticable for the bank to notify every taxpayer who had transacted business with the bank during the period of time in question and therefore denied the bank's customers their right to challenge its enforcement; and (4) the IRS had not acted in good faith in issuing the summons.

The district court, on June 1, 1972, rejected Bisceglia's affirmative defenses and ordered the bank to make available to the IRS those records reasonably related to the investigation. To avoid overburdening the bank and unnecessarily disclosing the transactions of bank customers that were not relevant to the IRS inquiry,[5] the court specified the records required as

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[5] At the hearing before the United States District Court, Bisceglia testified that the Commercial Bank processes ap-

those deposit tickets, if any, of the Commercial Bank, Middlesboro, Kentucky, which reflect cash deposits during the period from October 16, 1970, through November 16, 1970, in the amount of $20,000.00, and those deposit tickets, if any, of said bank which reflect cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period.

Bisceglia has appealed from this order the enforcement of which was stayed pending this appeal on July 14, 1972, and contends first, that the summons and subsequent order enforcing the summons are not authorized by section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (1967), and second, that they violate the Fourth Amendment's prohibition of unreasonable searches and seizures. Because we find that the summons and the order enforcing the summons are not authorized by the Internal Revenue Code, we do not reach the constitutional question.

In enacting section 7602 of the Internal Revenue Code, Congress specified the purposes for which the Internal Revenue Service is authorized to issue a summons as follows:

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . . 26 U.S.C. § 7602 (1967).

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proximately 1,250 to 1,500 cash tickets and 600 to 700 deposit tickets daily.

In this section, Congress has not authorized the IRS to examine records pertaining to the financial affairs of an indefinite number of unspecified persons for the purpose of ascertaining the identity of one or some of those persons who may be taxpayers and liable for taxes. Instead, the section presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding. Even the IRS summons form, Treasury Department Form 2039, acknowledges this presupposition because it begins with the words "In the matter of the tax liability of ————————," and informs the recipient of the summons that he is required to appear and give testimony "relating to the tax liability or the collection of the tax liability of the above named person . . . ." In this case, the IRS has inserted the name "John Doe" into the space provided for the name of the taxpayer under investigation, and it admits that the name is fictitious and that no person of that name is under investigation.

Although courts are required to "liberally construe the powers given the governmental agency" by section 7602 of the Internal Revenue Code, here, the district court's sweeping interpretation of this section has gone beyond mere statutory construction. *United States* v. *Giordano*, 419 F.2d 564, 569-70 (5th Cir. 1969), *cert. denied* 397 U.S. 1037 (1970). In the past, whenever the IRS has sought to use its summons power as an exploratory or identifying device to compel the production of records pertaining to a group of otherwise unidentified persons in the hope

of discovering whether persons in this group may be taxpayers or, if so, may be liable for income taxes, courts have moved swiftly to arrest or curtail the attempt. When the IRS seeks to obtain records from persons not themselves under investigation for the purpose of investigating others whose identity is known, courts have been particularly careful to ensure that investigation of the taxpayer and not a sweeping exploratory search is its object.[6]

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[6] In *Local 174* v. *United States*, 240 F.2d 387 (9th Cir. 1956), the IRS, allegedly pursuant to § 7602, issued a summons to a union local to produce any and all of its records for a five year period pertaining to any transaction between the Local and its president, Brewster, his wife and any of their agents. The court, characterizing the summons as a request for "a blanket turnover for an unlimited time," found that the Local, as a third party, was not "required to produce any item or document unless it was (1) in his possesion, (2) relevant to the tax liability of the Brewsters or either of them, or (3) material to the inquiry." *Id.* at 391. The summons was general, not particularized, and therefore unenforceable.

Even when the IRS seeks records held by a taxpayer who is under investigation, its power to examine records is not unlimited. Thus in *In re International Corporation Co.*, 5 F. Supp. 608 (S.D.N.Y. 1934), the court refused to order a taxpayer whose tax liability was under investigation to disclose the names of the foreign corporations that the taxpayer had helped organize because "the particular name of a corporation organized by petitioner would seem to have nothing whatsoever to do with the correctness of the income, or the deductions, reported in its return." *Id.* at 612.

In *McDonough* v. *Lambert*, 94 F.2d 838 (1st Cir. 1958), the court refused to order a taxpayer under investigation to disclose the name of an attorney to whom the taxpayer had allegedly paid $10,000 for legal services because even if that expense were disallowed, the tax liability of the taxpayer (who had sustained a loss of over $100,000 that year) would be unaffected. In refusing to uphold the order enforcing the summons, the court explained:

> We do not think the provisions of this section can be given such a broad construction; that by its terms it is more limited in scope and confined to the procure [sic] of evidence, oral or documentary, bearing upon matters required by law to be included in a given tax return to determine the correct tax liability of the person who made the return or who failed to make one, and was not intended to authorize the procurement of evidence that might be material in verification of the tax return of some other person, not known to the Bureau of Internal Revenue, and who may or may not have made a return. . . . *Id.* at 841.

Thus, in *Mays* v. *Davis*, 7 F. Supp. 596 (W.D. Pa. 1934), decided under the predecessor of section 7602, the court refused to require a trust officer of a trust company to produce for IRS examination all records disclosing the "names and addresses of the beneficiaries of trusts created by will where the widow, a beneficiary, has elected to take under the will . . . where the will provides for payment to her of income of the trust estate; and where income was paid to the widow" and all records showing "the name of each such trust." *Id.* at 596. The court properly characterized this summons as merely exploratory. The IRS, having no identifiable taxpayer under investigation, was seeking information about a group of persons having common characteristics in the hope of discovering some tax liability.

In *First Nat. Bank of Mobile* v. *United States*, 160 F.2d 532 (5th Cir. 1947), the court, also interpreting the predecessor of section 7602, refused to enforce a summons during an IRS investigation of several

named taxpayers, that required a bank "to produce for inspection and examination . . . any and all books, papers and records of whatever nature, *irrespective of whether such records also pertain to similar transactions with other persons or firms* . . . ." *Id.* at 533. (emphasis added). The court, finding that the order exceeded the scope of the statute, struck the italicized part of the order and substituted "which pertain to or reflect the issuance of cashier's checks . . . which bear upon, or have reference to the federal tax liability of the above-named firm and individuals . . ." *Id.* In denying a petition for rehearing, the court added that "[n]either the revenue agent nor the court has authority under the statute to require the product [*sic*] of memoranda, books, etc., of third parties unless they have a bearing upon the return or returns under investigation." *Id.* at 534.

In enacting section 7602 of the Internal Revenue Code, Congress intended to make "no material change [in] existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954); U.S. Code Cong. and Admin. News, 1954, p. 4025 et seq. Accordingly, courts have continued to refuse to sanction IRS "John Doe" summonses issued to third parties for the purpose of examining their records pertaining to the affairs of a particular group of persons when no identifiable taxpayer is under investigation.

In *United States* v. *Humble Oil & Refining Co.*, 346 F. Supp. 944 (S.D. Tex. 1972), the IRS sought from Humble Oil the identities of lessors of mineral

rights to whom the company had surrendered expired mineral leases without having extracted any minerals in order to determine whether these lessors had remembered to restore in their most recent tax returns the depletion allowances which they had claimed during the life of the lease. The IRS, upon admitting that it had neither the oil company nor any particular lessor, lease or land under investigation, was not permitted to use the summons power granted in section 7602 as a tool for research and exploration. The court found that "Congress intended that a person or persons or particular returns be under scrutiny by the IRS before such a summons can be issued." *Id.* at 947.

Similarly, in *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973), the court refused to uphold an order enforcing a summons that required an accounting firm to produce all the income tax returns and any and all related material pertaining to all its clients for a three year period. The summons was issued as part of a nationwide investigation of tax preparation firms to determine whether these firms were fairly computing the tax liabilities of their clients. In the course of the investigation, the IRS became suspicious of the Theodore accounting firm after the firm had prepared an incorrect tax return for one of its agents posing as a customer. The purpose of the summons was to determine whether the firm had made similar incorrect returns for other customers and, if it had, to determine their correct tax liability. The summons, characterized as " 'a

rambling exploration' of a third party's files" was unenforceable because section 7602 "only allows the IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe [sic] Doe summonses." *Id.* at 754, 755.

We believe that these cases control the disposition of this appeal. Here, the IRS has requested and the district court has approved a summons directed to a third party, the Middlesboro Commercial Bank to produce for inspection bank records relating to a group of persons who either deposited $20,000 at one time or who made deposits of one hundred dollar bills exceeding $5,000 at one time. The IRS has admitted that it has no particular taxpayer under investigation and that it desires the records solely for the purpose of obtaining the identities of persons and firms who made deposits of the nature described. It does not seek the records "[f]or the purpose of ascertaining the correctness of any return," for the purpose of "making a return where none has been made," for the purpose of "determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or" for the purpose of "collecting any such liability" as required by section 7602 of the Internal Revenue Code. In short, the IRS has not made the demonstration requisite for the enforcement of a summons—that it seeks third party records pertaining to the income tax liability of a particular taxpayer in whom

it is interested. Instead, the IRS has been granted a summons enabling it to inquire into the financial affairs of a group of unspecified persons in the hope of identifying one or more of them as the person or persons who transferred deteriorated bills to the Commercial Bank, a purpose not authorized by section 7602 of the Internal Revenue Code.

We believe, therefore, that *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), *cert. denied* 379 U.S. 913 (1964) and the related case of *Schultz* v. *Rayunec*, 350 F.2d 666 (7th Cir. 1965), cited by the IkS, are inapposite. In those cases, the court ordered enforced section 7602 summonses issued to a third party bank and an attorney during an investigation in which the IRS sought the identity of the person for whom the attorney had obtained a cashier's check for $215,-499.95 from the bank. The attorney had sent the check to the IRS accompanied by a letter that informed the IRS that the check was for unpaid taxes owed by an anonymous taxpayer. The IRS sought his identity from the attorney, whose claim of attorney-client privilege was upheld in *Tillotson* v. *Boughner*, 350 F.2d 663 (7th Cir. 1965), and from the bank, which was ordered to disclose the identity of the taxpayer whose money had been used to purchase a cashier's check from it. The court, in the earlier *Tillotson* case, was careful to distinguish the *Mays* case, *supra*, on the ground that in *Tillotson* not only did "*a* taxpayer" exist but also that the bank was requested to assist in determining that "specific taxpayer's liability." 333 F.2d at 516. (Emphasis in

opinion). The court did not sanction an examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation.

We decline to do by interpretation that which Congress has declined to do by legislation. The IRS is not authorized to issue a summons to a third party to compel production of that party's records except in furtherance of an investigation of the possible tax liability of specified taxpayers.

Reversed and remanded with instructions to deny enforcement of the summons.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

[Filed Oct. 18, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA and B. L. BRUTSCHER, Special Agent, Internal Revenue Service,
PETITIONERS-APPELLEES

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank, Middlesboro, Kentucky,
RESPONDENT-APPELLANT

Before: MCCREE, LIVELY, Circuit Judges, and KENNEDY, District Judge

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded

with instructions to deny enforcement of the summons.

It is further ordered that Respondent-Appellant recover from Petitioners-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1783

[Filed Nov. 16, 1973, James A. Higgins, Clerk]

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

—*vs*—

RICHARD V. BISCEGLIA, RESPONDENT-APPELLANT

BEFORE: McCREE and LIVELY, Circuit Judge, and KENNEDY,* District Judge.

ORDER

The petition for rehearing having come on to be heard, upon consideration, it is ORDERED that it be, and hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 532180 178

Supreme Court, U. S.
FILED
JUN 28 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1245

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

—v.—

RICHARD V. BISCEGLIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1974
CERTIORARI GRANTED APRIL 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1245

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

—v.—

RICHARD V. BISCEGLIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 72-1783

Appeal From Eastern District of Kentucky, at London

UNITED STATES OF AMERICA AND B. L. BRUTSCHER, SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS-APPELLEES

VS

RICHARD V. BISCEGLIA, AS VICE PRESIDENT OF THE COMMERCIAL BANK, MIDDLESBORO, KENTUCKY,
RESPONDENT-APPELLANT

(Internal Rev. Summons)

NO. BELOW: 1996 Civil

JUDGE BELOW: Moynahan

DATE OF JUDGMENT: June 1, 1972

NOTICE OF APPEAL FILED: June 30, 1972

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Date	Account of Appellant	Received	Disbursed	Remarks
8/9/72	William A. Watson	25.00		
8/21/72	Treasurer of U.S.-Acc't Fees Earned		25.00	

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 72-1783

Date	FILINGS—PROCEEDINGS
1972	
Jul. 3	Copy of Notice of Appeal
Aug. 9	*Certified record* (1 vol. of pleadings and transcript), filed; and cause docketed
" 10	Alternative motion by appellant for leave to dispense with an appendix or to permit filing of deferred appendix pursuant to Rule 30(c)
" 15	Appearance of counsel for Appellees
" 15	Appearance of counsel for Appellant
" 25	Ruling on motion of 8/10/72—Motion to dispense with appendix denied, motion to defer filing appendix granted—Peck, J.
Sep. 18	Appellant's designation of record for appendix
" 18	One typewritten copy of Brief for Appellant, with proof of service
Oct. 26	One typewritten copy of Brief for Appellees
" 26	Proof of service of brief for Appellees
Nov. 10	Twenty-five copies of Brief for Appellant
" 10	Ten copies of Appendix for Appellant
" 10	Proof of service of brief and appendix for Appellant
" 10	Twenty-five copies of Reply Brief for Appellant
" 10	Proof of service of reply brief for Appellant
" 22	Twenty-five copies of Brief for Appellees, with proof of service

Date	FILINGS—PROCEEDINGS
1973	
Feb. 2	Cause argued and submitted (Before: McCree, Lively and Kennedy, JJ.) W-114
Oct. 18	Judgment of the District Court reversed and the case is remanded with instructions to deny enforcement of the summons AA-2
" 18	Opinion by McCree, J.
Nov. 1	Twenty-five copies of Petition for Rehearing, with proof of service
" 16	Order denying petition for rehearing (McCree, Lively and Kennedy, JJ.) AA-4
" 29	Mandate issued (Costs to be recovered by Appellant—$25.00 filing fee)
	Opinion with mandate
Feb. 19	Notice of filing petition for certiorari on 2/13/74 (Sup. Ct. 73-1245)
Apr. 22	Certified copy of order granting certiorari on 4/15/74

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY AT LONDON

Civil Action No. 1996

UNITED STATES OF AMERICA AND B. L. BRUTSCHER, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS

v.

RICHARD V. BISCEGLIA, AS VICE PRESIDENT OF THE COMMERCIAL BANK, MIDDLESBORO, KY., RESPONDENT

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS—Filed Aug. 4, 1971

Now comes the United States of America and Special Agent B. L. Brutscher, Internal Revenue Service, by their attorney, Eugene E. Siler, Jr., United States Attorney for the Eastern District of Kentucky, and respectfully show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C., Sections 7402(b) and 7604(a) (1964), to judicially enforce an Internal Revenue summons.

II

The petitioner, B. L. Brutscher, is a special agent of the Internal Revenue Service and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., Section 7602 (1964), and Treasury Regulation,

Section 301.7602-1, 26 C.F.R., Section 301.7602-1 (TD 6421, Oct. 23, 1959 and TD 6498, Oct. 24, 1960).

III

The respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, may be located at said bank in Middlesboro, Kentucky, within the jurisdiction of this Court.

IV

The petitioner, Special Agent B. L. Brutscher, is conducting an investigation to determine the identity of a person or persons who, using "thin and brittle" (abnormal-deteriorating) one hundred dollar bills, made deposits totalling $20,000, sometime between October 22, 1970, and November 13, 1970, at the Commercial Bank; upon the determination of said person or persons' identity, he has been assigned to determine said person's or persons' tax liabilities, if any, for the year 1970.

V

The respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, is in possession and control of various bank books, records, and testimony of employees which will provide information as to the above-referred to person or persons.

VI

On April 22, 1971, a summons, Treasury Form 2039, was issued by the petitioner, Special Agent B. L. Brutscher, directing the respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, to appear before the petitioner, B. L. Brutscher, on May 3, 1971, at 9:00 a.m., to testify and to produce bank records relating to the tax investigation described in paragraph IV, all as more fully set out in the attached Affidavit and Summons. An attested copy of the summons was served upon the respondent, Richard V. Bisceglia, by the petitioner, B. L. Brutscher, on April 22, 1971, by handing it to Mr. Bisceglia. The summons issued to Mr. Bisceglia,

as Vice President of the Commercial Bank, is attached hereto and incorporated herein as Exhibit 1.

VII

The respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, failed and refused to comply with the terms of the summons described in paragraph VI, and such failure and refusal has continued to the date of this petition.

VIII

It was and now is essential to a determination of the identity of the person or persons described in paragraph IV and to his or their tax liabilities, if any, for the calendar year 1970, that the respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, be required to testify (or produce bank employees to give testimony) and produce the specific bank records demanded, as is evidenced by the Affidavit of the petitioner, Special Agent B. L. Brutscher, Internal Revenue Service, attached hereto and incorporated herein as part of this petition.

Wherefore, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, Richard V. Bisceglia, as Vice President of the Commercial Bank, to show cause, if any he has, why he should not comply with and obey the aforementioned summons and each and every requirement thereof.

2. That the Court enter an order directing the respondent, Richard V. Bisceglia, to obey the aforementioned summons and each and every requirement thereof, and ordering his attendance and testimony and production of the bank records demanded, as required and called for by the terms of the summons, before Special Agent B. L. Brutscher, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Brutscher, or any other proper officer of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That the Court enter such other and further relief as is just and proper.

By /s/ JOHN M. COMPTON
Assistant United States Attorney

EXHIBIT 1 TO PETITION

SUMMONS

In the matter of the tax liability of

John Doe

Internal Revenue District of Louisville

Period(s) 1970

The Commissioner of Internal Revenue

To Richard V. Bisceglia, Executive Vice President, Commercial Bank

At Middlesboro, Kentucky

Greetings: You are hereby summoned and required to appear before B. L. Brutscher, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth;

"Those books and records which will provide information as to the person(s) or firm(s) which deposited, redeemed or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 16, 1970."

Place and time for appearance:

at Your Office

on the 3rd day of May, 1971 at 9:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience of the requirements of this summons, and to punish default or disobedience.

Issued under the authority of the Internal Revenue Code this 22nd day of April, 1971.

Original

/s/ B. L. BRUTSCHER
Special Agent

AFFIDAVIT—Filed Aug. 4, 1971
(Attached to Petition)

B. L. Brutscher, a petitioner herein, being first duly sworn, deposes and says:

1. That I am a duly commissioned special agent of the Internal Revenue Service performing my duties under the District Director of Internal Revenue, Louisville, Kentucky.

2. That in my capacity as a special agent I was assigned to determine the identity of a person or persons who, using "thin and brittle" (abnormal-deteriorating) $100 bills sometime between October 22, 1970 and November 13, 1970, made deposits totaling $20,000 at the Commercial Bank; further, I have been assigned to determine, upon identification, said person's or persons' tax liabilities, if any, for the year 1970.

3. That pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, I personally served a summons, Treasury Form 2039, upon Richard V. Bisceglia, as Vice President of the Commercial Bank, on April 22, 1971. A true copy of the summons, attached as Exhibit

1 to this application and made a part hereof, directed Richard V. Bisceglia to appear before me on May 3, 1971 at 9:00 A.M. at the Commercial Bank, Middlesboro, Kentucky, then and there to give testimony (or produce bank employees to give testimony) and produce specific bank records in aid of the above-described investigation of the tax liabilities, if any, of the person or persons designated as "John Doe" in the summons.

4. That Richard V. Bisceglia, as Vice President of the Commercial Bank, failed and refused to testify (or produce bank employees to testify), and further failed and refused to produce the specific bank records demanded and such failure and refusal continues to the date of this affidavit.

5. That the testimony and specific bank records demanded by the summons served upon Richard V. Bisceglia are necessary for the determination of the tax liabilities of said unidentified person or persons.

Further your affiant saith not except that this affidavit is in support of a petition to enforce an Internal Revenue summons issued by the Commissioner of Internal Revenue to Richard V. Bisceglia, as Vice President of the Commercial Bank.

/s/ B. L. BRUTSCHER
Special Agent

Sworn to and subscribed before me this 4th day of August, 1971.

/s/ BRENDA L. PREWITT
Notary Public

My commission expires: May 12, 1972.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY AT LONDON

ORDER TO SHOW CAUSE—Filed Aug. 9, 1971

[Caption omitted]

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent B. L. Brutscher, Internal Revenue Service, and upon motion of Eugene E. Siler, Jr., United States Attorney, it is

Ordered that Richard V. Bisceglia, as Vice President of the Commercial Bank, appear before the United States District Court for the Eastern District of Kentucky in that branch thereof presided over by the undersigned on the 13th day of September, 1971, at 9:00 A.M. to show cause why he should not be compelled to obey the Internal Revenue summons served upon him on April 22, 1971. It is further

Ordered that a copy of this order, together with the petition and exhibit thereto, be served personally upon Richard V. Bisceglia at least 20 days prior to the time set herein for hearing.

Dated at Lexington Kentucky, this 6th day of August, 1971.

/s/ BERNARD T. MONAHAN, JR.
Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY AT LONDON

ANSWER—Filed Aug. 18, 1971

[Caption omitted]

Comes now Richard V. Bisceglia, the respondent named above, by counsel, and for his answer to the petition filed herein states as follows, to-wit:

1. He denies the allegations contained in paragraph I of the petition on the ground that inasmuch as the Special Agent who issued the summons in question has proceeded without authority under the statutes to issue the same, he is likewise without authority under the statutes identified in paragraph I to enforce that summons under the statutes cited.

2. He admits that petitioner is a Special Agent authorized to issue Internal Revenue summonses under Section 7602 of the Internal Revenue Code of 1954 and under the Treasury Regulations cited, but denies that such authority existed under the circumstances prevailing in this case.

3. He admits the allegations contained in paragraph III of the petition.

4. He admits that Special Agent Brutscher is conducting an investigation to determine the identity of person or persons who made deposits in Commercial Bank totalling $20,000 sometime between October 22, 1970, and November 13, 1970, but he has no knowledge as to whether such cash deposits were "thin and brittle" (abnormal-deteriorating) one hundred dollar bills, and the allegations to that effect contained in paragraph IV are therefore denied and strict proof thereof is demanded; the respondent has no knowledge of whether petitioner, upon the determination of the identity of the person or persons making such a deposit, if any such single deposit was made, has been assigned to determine the liability of the person or persons making such deposit for 1970 income taxes and, therefore, that allegation of paragraph IV of the petition is denied and strict proof thereof is demanded.

5. The respondent admits that he is in possession and control of the bank books and records which probably will show the origin of any cash deposits made during the period in question, but he is not in possession of testimony of employees, and this part of paragraph V is denied.

6. The allegations contained in paragraph VI are admitted to be true.

7. The allegations contained in paragraph VII are admitted to be true.

8. The allegations contained in paragraph VIII are not known by the respondent to be true, wherefore the same are denied and strict proof thereof is demanded.

FIRST AFFIRMATIVE DEFENSE

The respondent avers that the petitioner has failed to state in the summons which he now seeks to enforce, or in this petition, the name of any particular taxpayer concerning whom his investigation is oriented. The issue of the summons, and the tenor of the petition filed seeking its enforcement, is that because a large sum of money was deposited in the bank during the period of time mentioned in the petition, and later sent by the bank to the Federal Reserve Bank at Cincinnati, Ohio (which is the source of the IRS information concerning this money), there may be a taxpayer who is liable for some income tax for the year 1970. Special Agent Brutscher wants to know who the depositor of this sum of money was, if it was done in a single deposit, so he can look into this taxpayer's affairs, but he doesn't know the name of the taxpayer. We may suspect that Special Agent Brutscher or his superiors suspect fraud on the part of the depositor of this large sum or sums of money, since he is primarily involved with criminal investigations, but for the purpose of this proceeding he is taking the position that he is only interested in determining the tax liability for the year of 1970 of the person or persons who put this sum of money in the bank. The money may not have been deposited actually but could have been turned in for

newer bills or different denominations. In any event, the summons does not comply with the requirements of Section 7602 of Title 26, United States Code, since it is implicit in the language of that section that the inquiry must be related to the affairs of a particular person and the summons may not be used for a fishing expedition. Under the circumstances, therefore, the summons represents an exploratory operation on the part of the agent and on that basis it is not justified by the statute and is unreasonable under the circumstances. For the same reason, it constitutes an unlawful search and seizure.

SECOND AFFIRMATIVE DEFENSE

The inquiry being made by Special Agent Brutscher, in view of his capacity as an employee of the Intelligence Division of the Internal Revenue Service, whose primary investigative responsibility is criminal matters, must be considered to have strong overtones of a criminal investigation, and the statute does not authorize the use of the summons provided in Section 7602 under these circumstances, or where the inquiry has dominant criminal overtones. Were it otherwise, there would be no reason for a Special Agent in the Intelligence Division to conduct this investigation.

THIRD AFFIRMATIVE DEFENSE

Any taxpayer whose records are sought to be produced by the summons authorized by Section 7602 has the right to challenge the enforcement of the summons. Hence, under the circumstances in this case, where no particular taxpayer's records are sought, but all taxpayers who do business with this bank in any way may be affected by the inquiry, all such taxpayers who have records at the bank or who had had transactions with the bank involving cash are denied the right to challenge the enforcibility of the summons, since the summons is not directed at any specific taxpayer. It would be impossible and impractical for the bank to notify every single taxpayer who had some transaction with the bank during the period in question of the pending inquiry and the use of the summons concerning bank records so that these people, who would number literally in the hundreds, could be notified of their right to appear and challenge the enforcement of this particular summons.

FOURTH AFFIRMATIVE DEFENSE

The petitioner has not acted in good faith under the circumstances which prevail in this case and his action amounts to a clear abuse of the procedures described in Section 7602 of the Internal Revenue Code of 1954.

Wherefore, Richard V. Bisceglia, having answered the petition filed herein, prays that his refusal to honor the summons served upon him on April 22, 1971, be affirmed by this Court as proper under the circumstances and that he not be required to honor that summons, that the petition herein be dismissed and held for naught, and for all other proper relief to which he may be entitled at law or in equity.

By /s/ William A. Watson
Watson & Watson
Attorneys at Law
1911½ Cumberland Avenue
Middlesboro, Kentucky 40965
Attorneys for Respondent

PETITIONERS' TRIAL EXHIBIT 1

REPORT OF CURRENCY TRANSACTIONS

See Reverse for Instructions

Part A. Person or Organization Concerned in Transactions Reported

Name Commercial Bank
Address Middlesboro, Kentucky
Business, profession, or occupation .....

Part B. Description of Transactions

Date	U. S. Currency Involved: Total amount	U. S. Currency Involved: Amount in denominations of $100 or higher	Nature of Transactions (State whether deposit, withdrawal exchange of currency, cashing or purchase of check, etc.)
11/ 6/70	$54,600.	$20,000 in 100's)	Hundreds in deteriorated condition, apparently from long period of storage.
11/16/70	69,000.	20,000 in 100's)	

Additional information .....

Part C. Financial Institution Reporting

Name Cincinnati Branch
Address Federal Reserve Bank
Cincinnati, Ohio 45201

(Stamp)

District Director of Internal Revenue
Cincinnati

Received
Dec. 24, 1970
Intelligence Division

[Caption Omitted]

TRANSCRIPT OF PROCEEDINGS

(September 13, 1971)

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[8]

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[Testimony of David Weisbrod]

DIRECT EXAMINATION

BY MR. SNOW:

Q. Sir, state your name to the Court and please spell the last name for the reporter.
A. David Weisbrod, W-e-i-s-b-r-o-d.
Q. What is your residence address, sir?
A. 553 Starling Court, Cincinnati, Ohio.
Q. Sir, how are you employed at this time?
A. The Cincinnati Branch, Federal Reserve Bank of Cleveland.
Q. What is your job title?
A. I am Manager of the Cash Department.
Q. And how long have you been the Manager of the Cash Department?
A. Since September of 1967.
[9] Q. And were you employed by the Federal Reserve Bank before that time?
A. I have been employed since February 2nd, 1946.
Q. And, sir, in your present job title what are your duties, briefly?
A. Well, the operations of currency payments and receipts to commercial banks in the Fourth Federal Reserve District and this encompasses approximately fifty people that I would have working in various capacities which I directly supervise.
Q. Approximately, sir, how many member banks are there?
A. In the Cincinnati branch?
Q. Yes, sir.

A. Right off the top of my head I would say in the neighborhood of 200.

Q. Was the Commercial Bank of Middlesboro one of these members?

A. They are a non-member bank. They are not a member of the Federal Reserve System.

Q. Have you had dealings, however, with the Commercial Bank?

A. Yes, sir, we have received deposits from them and we have made shipments to them.

[10] Q. Now, sir, directing your attention to November 6th and November 16, 1970, did you have any dealings with the Commercial Bank of Middlesboro?

A. We did on both occasions receive currency deposits from this non-member bank for credit to a member bank.

Q. I see. And taking November 6th, 1970 did your bank have occasion to receive $20,000 in $100 bills among other deposits from the Commercial Bank?

A. Well, the $20,000 was part of a deposit made by Commercial Bank of Middlesboro on November 6th, and then again on the 16th.

Q. You received an additional $20,000 in $100 bills from the Commercial Bank?

A. Right.

Q. What, if anything, did you notice about this particular shipment?

A. The $100 bills that were received, many of them, were in a deteriorated condition, which it is rather unusual to receive this quantity in this condition.

Q. Well, when you say deteriorated, sir, what do you mean?

A. Well, they were tissue paper thin; they were very difficult to count, and had had some unusual weathering or some climatic effects, I would assume, that [11] would cause it.

MR. WATSON: I object to his conclusions, Your Honor.

MR. SNOW: He's an expert, Your Honor. He's been with the Federal Reserve Bank since 1946.

THE COURT: Well, objection was made, the objection is sustained unless you show his qualifications in

determining the deteriorated condition of money. He could have been up there in an office and seen no money.

MR. SNOW: Well—

THE COURT: I assume that you can show that, but we can't speculate about it.

MR. SNOW: Yes, sir.

THE COURT: All right.

Q. Before we get into that, sir, what, if anything, happened to these two particular shipments?

A. Well, when I was informed that we had received currency that was in bad condition, I personally [12] examined it and I brought it to the attention of my immediate superior, Howard E. Taylor, who is now deceased, and he suggested that this TCR-1 form be prepared.

THE COURT: Let me ask you a question. What denominations was it in?

A. These were all $100 bills.

THE COURT: $100 bills—all right.

Q. I'm going to show you—

THE COURT: Mr. Marshal—the Marshal carries the exhibits.

MR. SNOW: Excuse me, Your Honor.

Have it marked for identification, Mr. Marshal. The attorney has a copy of this already. It is attached to our memorandum.

(Reporter's note: At this time a copy of the TCR-1 form above referred to is marked for identification purposes only as Exhibit Number 1 for the United States).

MR. SNOW: Mr. Marshal, will you show that to the [13] witness, please.

(Reporter's note: At this time Exhibit Number 1 marked for identification is handed to the witness).

Q. Now, Mr. Weisbrod, is that a true copy of the TCR which you caused to be prepared?

A. Yes, sir.

Q. It is?

A. Yes.

MR. SNOW: Then, without objection, I would move that this be marked into evidence, Your Honor.

THE COURT: Any objection?

MR. WATSON: No objection, Your Honor.

THE COURT: All right, let it be filed.

(Reporter's note: The form above mentioned is filed herewith and made part of the record herein, and will be found as a part of the Clerk's record, marked Government's Exhibit Number 1.)

Q. Now, Mr. Weisbrod, you have been there since 1946, how many bills does that bank deal with daily?

[14] A. Daily, there's a great deal of inconsistency. Let's say during the year 1970 that my department received and processed 96 Million pieces of currency.

Q. 96 Million?

A. Yes.

Q. And does your department ever have occasion to notice substantial amounts of what does not seem to them to be, or to you to be, normal paper?

A. Well, generally there would not be a large quantity of currency received in the manner or condition in which this currency was. You may run across a few bills here and there that may be in such deteriorated condition, but no accumulation of them. To the best of my knowledge, there was only one parallel situation and that was several years ago where a large hoard of money was found that was in comparable condition. It was stored in milk cans that were buried in concrete.

Q. Well, now, sir, when you receive shipments of money from banks do you assort this money?

A. We sort the currency to determine fitness; the unfit is removed for redemption, and also there is inspection for counterfeits, and so on, by the various people handling the money.

Q. Now, sir, what is your theory for determining if money is unfit?

[15] A. The condition of the money is determined by the Treasury Department circular which generally would be—it cannot be limp; it has to have some of the sizing and must not be offensively marked or excessively

dirty, and it must have the feel and the sizing in the paper.

Q. And this test was applied to the money in question, I presume?

A. This money in question was tissue paper thin and would not qualify as fit currency. It definitely was unfit currency.

Q. This is your opinion?

A. Right.

Q. Based on your job training?

A. Yes.

Q. Now, sir, when you received it from the Commercial Bank would you state whether or not there was any difficulty in sorting this particular, or these two particular shipments?

A. Well, as part of our internal operation any 50's or 100's that are received by our bank are counted immediately in the receiving cage by the two tellers that receive the currency—well, that stands to be corrected: One of the two tellers must verify the currency. The fellow that did verify some of this money was making the remark to me that he had experienced a rather difficult time in [16] that the bills were—because they were so thin and in deteriorated condition he had a hard time getting them apart in that he had to count it several times in order to come up with the correct amount that was under the strap.

Q. You say "under the strap", who puts the listing under the strap, is that the Commercial Bank?

A. The Commercial Bank would strap the currency and usually stamp their name on it per the operating or governing—

Q. And you must check that and see if that is correct?

A. Well, we do verify the count to make sure the dollar amount would correspond with the amount shown on the strap.

Q. Now, sir, if this money was not fit for additional use, what happened to it—was it destroyed?

A. Well, as part of the normal operations after it is received in a receiving cage it is turned over—well, 50's and 100's would be turned over directly to the

assorting division and it would be held until such time as it would be subsequently re-verified, again inspected for counterfeits and sorted out to district for the unfit, and as far as fit currency, it is sorted into the category of fit, and then it ultimately is destroyed by incineration in our office.

[17] Q. And this is what happened in this case?

A. Right.

Q. No, sir—

THE COURT: You mean, this currency has been destroyed?

A. Yes, sir, we held this for a period of time and it has subsequently been destroyed. We had not been ordered to hold it, or anything else. We did call the Secret Service—this I'm not certain of—let's say, my superior at that time, I know, contacted someone, whether it was Secret Service or whether it was IRS, this I do not know.

THE COURT: What did they want to burn up the evidence for, or destroy it? Well, you don't have to answer it. I can't think of any sensible answer to that. What about it, Mr. Snow, is it gone?

MR. SNOW: Well, sir, I think the best man to answer that is Agent Brutscher whom I will call as the next witness.

THE COURT: There may be some reason for it, but I— [18] all right, go ahead. I would like to have seen what it looked like.

Q. Now, sir, can you tell me previous to November 6th, 1970 what was the last previous time Commercial Bank send you a shipment?

A. Well, I have here all our deposit forms for the year 1970 and—

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BY MR. SNOW:

Q. Mr. Weisbrod, you have already indicated to the Court that you have been employed by the Federal Reserve Bank in Cincinnati since 1946. Directing your

attention to the years 1965 and 1966 what was your job title?

A. I was the Supervisor of Currency Section, which required that I physically handle all the money that came in through the Bank or was processed by our bank other than for the periods where I may be rotated out in conjunction with the bank's requirement of rotation.

Q. Now, sir, if there was any money that was in deteriorated condition you would be in position to see this money, would you not?

A. What was this question again?

Q. If there was any money, sir, that was in deteriorated condition in the judgment of the people in your section, would you have had occasion to have seen this money?

A. Right. Any money that would be unusual, or possibly require special handling, it would have been brought to my attention.

[21] Q. Possible counterfeit?

A. Counterfeit, and things of this nature, yes.

Q. And you testified earlier that the previous year you were responsible for approximately 96 million dollars in bills?

A. 96 million pieces, which could have been in excess of 800 Million Dollars.

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[22]

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Q. Do you sir, in your present job make a determination—are you responsible for a determination as to whether money should be placed back into use?

A. I would assume to some degree this may be true through the people that I am working with, or my subordinates, to where we may determine the type of money that is fit and unfit.

Q. Did you make such a determination with regard to the $40,000 in $100 bills in this case?

A. Right.

Q. And what was the determination—that it should be placed back into use?

[23] A. No, that it was unfit for further circulation because of the deteriorated condition of the money.

Q. How long have you been in this particular capacity where you could make this determination?

A. On and off since 1955.

Q. No, sir, you already testified that there were two deposits made by the Commercial Bank pertaining to the money involved on the 6th of November and on the 16th of November. Could you indicate to the Court the last date of the previous deposit made by the Commercial Bank with the Federal Reserve Bank—that is, prior to November 6th?

A. According to the bank records, it would have been their shipment of October 22nd, which we received on October 23rd.

Q. And did the bank at that time turn in any $100 bills?

A. No, sir.

Q. Now, you have gone over your records at my request, sir, and I have asked you to examine for the whole year of 1970 up to and including November 6th the total amount of $100 bills which the Commercial Bank sent to the Federal Reserve Bank. Did you determine that amount?

MR. WATSON: Objection.

[24] A. This was $21,800.00.

THE COURT: The objection is overruled.

Q. In other words, prior to the $40,000 we're talking about, there was $21,800?

A. Right.

Q. And generally speaking in what segments would this be turned over to the bank?

A. There were four separate deposits that contained $5,000 each, and one deposit that contained $1800 and these were $100 bills.

MR. WATSON: Your Honor, let me object on the basis if I understand counsel's purpose here, it is not to show the denomination of the bills received, but the condition.

THE COURT: Wouldn't he be entitled to show that this was an unusual amount of $100 bills for them to

send in? I'm thinking that that's probably what he's driving at.

MR. WATSON: That might be what he's driving at. I don't think it is relevant.

THE COURT: All right, overruled.

[25] Q. Sir, in this previous $21,800 did you notice any, as you say, deterioration in these bills?

A. I would assume the bank sent these in as unfit currency. There was nothing unusual with this currency—that is, out of the ordinary of what we would normally receive from any bank, and, therefore, none of these were brought to my attention.

Q. Something is only brought to your attention when it is thought to be unusual?

A. Right.

Q. No, sir, it is understood by all of us here that this particular $40,000 has been destroyed. Can you give the Court an idea of about when it was destroyed?

A. I would say approximately some time during the month of December, 1970.

Q. Can you also indicate to the Court whether or not you made any actual telephonic contact, personal contact, with the Internal Revenue Service before destroying it?

A. I know of none personally. I don't know what Mr. Taylor may have done, who was my immediate superior.

Q. Personally speaking, do you know whether or not any other Governmental agency was contacted?

A. To the best of my knowledge, I believe they [26] did contact Secret Service. I did not personally.

MR. SNOW: No further questions, Your Honor, of this witness.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. WATSON:

Q. Mr. Weisbrod, is that correct?

A. Yes, sir.

Q. You didn't open the shipment of money from the Commercial Bank?

A. No, all the money as it is received is opened and verified by two tellers working under dual control in the presence and view of each other, and, as I stated before, it is their responsibility to verify, on receipt, any $50 or $100 bills that they receive, and they are the ones that initially brought this to my attention, not immediately, but later on.

Q. And only these two sums of money was brought to you—not the entire shipment from the bank?

A. No, the $100 bills were the only ones—the only bills that were in this bad deteriorated condition, and, therefore, nothing else was unusual as far as the deposit.

[27] Q. Do you remember how much was in each deposit other than this money you're talking about.

A. I can tell you here, if you want a breakdown of it. The deposit that we received on November 6th, according to the deposit tickets made out by your bank contained $3,100 in 2's; $2,500 in 5's; $5,000 in 10's; $24,000 in 20's; $20,000 in 100's, for a total of $54,600.

Do you want the other one too?

Q. Yes, just in total.

A. Do you want the 16th also?

Q. Yes.

A. The deposit of the 16th?

Q. Yes.

A. There were $2,500.50 in 1's, apparently the 50¢ being for 2/5th, but less than 3/5th of a bill; 5's $1500; 10's $11,000; 20's $34,000; total deposit $69,000.50.

Q. Does money have to be in as bad a condition as you described this money before it is taken out of circulation?

A. No, sir. This money was in much worse condition than what the average money that is received by us that would be classified as unfit. As I say, it was in deteriorated condition; it was tissue paper thin; it didn't have the sizing or quality that you would normally [28] find in paper currency.

Q. It is part of your Department's job to remove currency that is not considered fit to continue in circulation?

A. This is right, this is a function of our sorting division, to verify any currency deposited with us and remove the unfit from circulation.

Q. Is there some of this unfit money in almost every deposit you receive from your member banks?

A. Generally I would say yes, not necessarily, though —it need not be, it can be fit currency that the bank has accumulated.

Q. Do you know what sort of a time table Commercial Bank generally sends in its deposits on—how many days or weeks elapse on the average?

A. Well, generally commercial banks are tied in with existing armored car runs to where they can utilize their services or they can't. It depends on the cash flow the bank has. Some banks are receiving banks—some banks are depositing banks. It need not be consistent.

Q. So, you don't know particularly about Commercial Bank, how frequently they sent money in to you?

A. Well, the bank here, The Commercial Bank of Middlesboro over the past year sent us 24 deposits—24 deposits during the year 1970, and, therefore, it figures [29] out to about twice a month on the average.

Q. All right.

* * * *

[Testimony of Baldwin Lewis Brutscher]

DIRECT EXAMINATION

BY MR. SNOW:

Q. Sir, please state and spell your last name to the Court.

[30] A. My full name is Baldwin Lewis Brutscher. The spelling of my last name is B-r-u-t-s-c-h-e-r.

Q. And what is your residence address, please sir?

A. 425 Moreed Road, Louisville, Kentucky.

Q. By whom are you employed, Mr. Brutscher?

A. By the Intelligence Division of the Internal Revenue Service of the United States Treasury Department.

Q. How long have you been employed by the Internal Revenue Service?

A. Approximately 11 years.
Q. Have you spent all this time as a Special Agent of Intelligence?
A. Yes, sir, I have.
Q. What generally, sir, then are the duties of an Intelligence Agent?
A. We investigate alleged violations of the tax laws of the United States.
Q. Allegations of fraud, and possible criminal violations, would that be correct?
A. Yes, sir.

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Q. Turning to the particular case, sir, what is the policy of the Internal Revenue Service when they receive a TCR such as Government Exhibit Number 1—to what division is that assigned?
A. I think it initially comes to the Intelligence Division. I'm not positive of that.
Q. What other divisions are there in Internal Revenue?
A. The Audit Division, and Collection Division are the primary other divisions.
Q. Again going to this particular matter, sir, where was your post of duty on April 22, 1971?
A. My post of duty was Louisville, Kentucky, which governs the State of Kentucky.
Q. And you are associated in the present case, sir, against Bisceglia?
A. Yes.

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Q. What years, sir, are involved in the present tax investigation?
A. The year 1970.
Q. This is a rather unusual investigation. Will you explain, sir, what the nature of the investigation is?
A. It is unusual in that we do not know who the taxpayer is.
Q. And why, sir, are you involved in it?

A. The most direct answer is because my chief told me to go.
Q. Why is your chief interested in this case?
A. Because it's an unusual transaction of currency.
Q. What is unusual about the transaction?
A. It's unusual because of the amount and because of the fact the money was apparently in a deteriorated condition.
Q. What possible tax effect could this have on the taxpayer if he is determined?
[33] A. Well, it could be anything from nothing at all, a simple explanation, or it could be that this is money that has been secreted away for a period of time as a means of avoiding the tax.
Q. And upon which tax has not been paid?
A. That's correct, sir.
Q. Then you really have not reached first base yet, is that correct?
A. That's correct.
Q. Before you can continue your investigation you must know who you are investigating?
A. I must.
Q. Now, sir, we have heard about deteriorated bills. We have also heard that prior to the $40,000 of these type of bills submitted by the Commercial Bank to the Federal Reserve Bank that during the ten months previous to 1970 that bank had submitted a total of $21,800 in $100 bills to the Federal Reserve Board. With this knowledge, and with the additional knowledge that $40,000 passed on the 6th and 16th of November, let us take the hypothetical and presume that that money was normal money, in your eleven years as a Special Agent would you still be interested in such a transaction in knowing who the taxpayer, or taxpayers, were?
A. Yes.
[34] Q. Why?
A. Because why this difference all of a sudden—why do they go along at a certain seeming level and all of a sudden it changes—it's just a matter of professional curiosity.

Q. Would the fact that the bank had not submitted any $100 bills on the date previous to November 6th affect your inquiry? Make you more interested?

A. If they had not submitted any in the past—

Q. Why they did not.

A. —and then submitted a great number?

Q. Yes.

A. Yes, it would.

Q. What steps then, sir, have you taken to get the information—that is, the name of the depositor, or depositors, from the Commercial Bank?

A. I went to the Commercial Bank and talked to Mr. Bisceglia and told him what the situation was; that I was attempting to determine who or how many people and what the circumstances were concerning these deposits, and that was my purpose at the Bank.

Q. So, Mr. Bisceglia was most gracious, did he introduce you to any other bank employees?

A. Yes, he did.

Q. And what was the general nature of the [35] conversation and whom whom did you have it—who were those other people?

• • • •

A. Of course, the introduction took place. I asked Mrs. Sufferidge—

Q. Who is Mrs. Sufferidge?

A. I think she has the title of Vice President. She is, in effect, what I would normally speak of as the head cashier.

Q. Go ahead.

A. I explained to Mrs. Sufferidge what my mission was at the bank and asked her if she could be of assistance. She said that she could not swear who the person was, or persons—she didn't say.

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Q. Did you make a determination, Mr. Brutscher, as to what periods at the bank, for what period you would

like to examine their records to make a determination as to whom the "John Doe" is?

A. Yes, I asked for a certain period—I asked Mrs. Sufferidge.

Q. Well, let us not get into that. In your own mind, based on your conversations, have you determined in your own mind what period will be necessary for you to go into and examine them?

A. If I need to examine them, yes, sir.

Q. Would that period be October 22 through November 13?

A. Yes, sir.

MR. SNOW: This is the period, Your Honor, that we are talking about.

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Q. Now, Exhibit 2, sir, is that the original of the summons, an attested copy of which you handed to Mr. Bisceglia?

[41] A. Yes, sir.

Q. Now, sir, is it necessary for you to go into those bank records?

A. Is it necessary for me to?

Q. Yes, sir, or can some other arrangement be worked out?

A. Some other arrangement could easily be worked out.

Q. For instance, the Bank could determine this for you and you would have to go through no records?

A. That is correct.

Q. You would accept the Bank's word?

A. I would.

Q. Now, sir, for the record, has a criminal prosecution been recommended against "John Doe," the taxpayer, at this time?

A. No, sir.

MR. SNOW: No further.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. WATSON:

Q. Mr. Brutscher, as I understand it, you intended to examine the Bank's records for the period Octo- [42] ber 22 through November 13 in order to pick up the source of these two shipments?

A. No, sir, my intention to look at those records was to assist the bank employees in refreshing their memory as to who brought the money in.

Q. Well, you wanted the records examined during that period, that's what I'm getting at?

A. For that period, yes, sir.

Q. Whether it was to determine it yourself or to help somebody refresh their recollection that 22 day period is the period you were going to have the records checked as an initial proposition?

A. Yes, sir.

Q. And, I assume, if you didn't find what you wanted there you would have probably wanted to expand the examination?

A. If the bank employees indicated to me that there might be a possibility of determining the identity of the person by some other means, yes, sir.

Q. And in order to determine the source of cash, you would either examine deposit tickets for checking and savings accounts, or look at the cash tickets for across the counter cash transactions?

A. I would think the cash tickets would be the fastest way to do it.

[43] Q. If the cash tickets didn't show it then you would go to the deposit tickets?

A. Yes.

Q. For each of those days?

A. For each of them until such time as we established the identity of it.

Q. And if not found during that period then you would expand the period backward, wouldn't you?

A. I would have to arrive at that point to see. I'd say, I doubt it.

Q. Well, you would normally do that if you didn't find what you wanted in that period?

A. I don't know, based on what I was told, that I would go any further.

Q. Do you have any idea how many individual items would have to be examined, cash tickets and deposit tickets, for each day within this period?

A. No, but it would be quite a few, I would imagine.

Q. Were those items on film or were they original cash tickets and deposit tickets still available?

A. The original cash tickets were available I was told. There was microfilm there of deposit tickets. Whether or not the originals were there, I don't know.

Q. Now, you are proceeding here in issuing [44] this summons, are you not, Mr. Brutscher, merely on a suspicion that there might be some tax due on the part of some taxpayer who had some transaction with that bank?

A. I think the answer to that is yes, as I follow that question.

Q. And that suspicion, in turn, is based upon another suspicion that because the bank submitted to the Federal Reserve Bank on the 6th and 16th of November, 1970 shipments containing $20,000 each in $100 bills?

A. Only in relationship to the fact that they were odd, as opposed to their normal course of business.

Q. Odd only in that they were old?

A. No, odd in that they were old and they were odd as to the normal course of business of the bank.

Q. And this information which was related to you by Mr. Weisbrod's office is the basis of your suspicion?

A. The TCR that was prepared, I assume by Mr. Weisbrod's office, initiated the action on my part, yes, sir.

* * * *

[45] THE COURT: Mr. Brutscher, did you attempt to talk to the parties there in the bank who might know who conducted any transaction involving such currency?

A. Did I, sir?

THE COURT: Yes.

A. Yes, sir.

THE COURT: And did they decline to give you any information or did they indicate they didn't know, or did they indicate they would have to examine their records?

A. Mr. Bisceglia indicated that he did not know. Mrs. Sufferidge would not say she didn't know, but her statement on several times was that she could not swear who did it. I asked her if she looked at her records would this help refresh her memory, and she said: "I suppose it would."

THE COURT: All right, anything else.

MR. SNOW: I would like to re-call Mr. Weisbrod for one question, Your Honor, which I neglected to ask him.

[46] THE COURT: All right. All right, you may step down.

The witness, DAVID WEISBROD, having been re-called, and having been previously sworn, testified further, as follows, on

RE-DIRECT EXAMINATION

BY MR. SNOW:

Q. Mr. Weisbrod, I have one question: We have heard testimony there were two shipments received on the 6th and 16th of November comprising $40,000 in $100 bills. Were these two shipments of money—the money involved, in the same deteriorated condition?

A. The money in both shipments was in deteriorated condition and unusual.

Q. Thank you.

• • • •

[50]

• • • •

[Testimony of Richard V. Bisceglia]

DIRECT EXAMINATION

BY MR. WATSON:

Q. State your full name, please, sir.

A. Richard V. Bisceglia.

Q. Are you the defendant named in this action being tried here today Mr. Bisceglia?

A. Yes, sir.

Q. How old a man are you?

A. 34.

Q. Where do you reside?

A. 142 Edgewood Road, Middlesboro, Kentucky.

Q. And you are identified in the petition as the Vice President of the Commercial Bank of Middlesboro, Kentucky, is that correct?

A. Yes, sir.

Q. Do you have a more exact title, or is there some addition to your title that's not shown here?

A. Executive Vice President and Trust Officer.

Q. How long have you been with the Commercial Bank?

A. Since August 15, 1959.

Q. What were your duties and what was your title on the 22nd of April, 1971, when you were served with [51] this summons by Agent Brutscher?

A. I was in charge of the loan department.

Q. Did you have the same title otherwise, Vice President, and so forth?

A. Yes.

Q. Now, being in charge of the loan department, what are your duties?

A. Well, I appraise the houses for the mortgage loans, and I'm in charge of the financial statements for customer loans and in charge of the collateral on any loan, and any record pertaining to the loan department.

Q. Do you have access to the other records of the bank?

A. Yes, sir.

Q. Are they primarily under your control other than the ones you have named here?

A. No, sir.

Q. Now, this summons which was served upon you mentions the two shipments of $20,000 each on November 6th and November 16th, 1970 from your bank to the Federal Reserve Bank in Cincinnati. About how frequently, if you know, are money shipments made from your bank to the Federal Reserve Bank?

A. Approximately every two to three weeks.

Q. Who is responsible for making up those [52] shipments in cash?

A. Mrs. Dorothy Sufferidge.

Q. What is her position?

A. Vice President.

Q. You have heard testimony of Agent Brutscher and read the summons in which the Government seeks to determine the identity of persons, or the person, if an individual, who deposited, redeemed, or otherwise gave to Commercial Bank, these two shipments of currency. Do you personally have any knowledge of the identity of the person, or persons, who gave to the Bank these amounts of currency in $100 bills?

A. No, sir.

Q. In order to determine the source of these sums of money—that is, the date on which they were received and the person, or persons, from whom they were received, what records of the Bank would have to be examined to determine this information?

A. Well, you would have to examine the deposit tickets and the cash tickets.

Q. Now, the deposit tickets pertain to both your checking and savings accounts, is that correct?

A. Yes, sir.

Q. Approximately how many checking and how many savings accounts are there at your Bank?

[53] A. Well, the checking accounts would number approximately 3700, and the savings accounts would number around 2900.

Q. About 6,600 accounts for which the deposit tickets would have to be checked on a daily basis during the period described by Agent Brutscher?

A. Yes, sir.

Q. And how are those deposit ticket records maintained for the period in question?

A. Well, the deposit tickets are on film, and the cash tickets are original in a paper folder—brown paper envelope.

Q. The original cash tickets are still in existence?

A. Yes, sir.

Q. How many days transactions are contained on a single roll of microfilm, as far as the deposits?

A. I would say approximately five or six days, maybe.

Q. Do you have a machine at the bank for the purpose of displaying microfilm records?

A. Yes, sir.

Q. About how many cash transactions would occur across the counter in the bank on any average day?

A. The cash tickets would be anywhere from [54] 1250 to 1500 daily.

Q. And about how many deposits per day for all accounts?

A. I would say, approximately 6 to 700.

THE COURT: Excuse me. What do you mean by cash ticket?

A. Well, a cash ticket would be the off-setting slip of paper that the teller, when she has a deposit with strictly cash, she would make out a cash ticket, the end ticket, we call it, to run through the proof machine to balance out the transaction.

THE COURT: Let me ask you this: If I go in the bank with a $100 bill and say I want 10's, there's no record kept of that, is there?

A. No, sir, that's just an exchange.

THE COURT: Suppose I went in with $10,000 in deteriorated currency and say I've got this money I want you to exchange, would you keep any record of that?

A. Well, if it was just an exchange, we would just exchange the money out.

[55] THE COURT: That would be a very unusual transaction, though, wouldn't it?

A. Yes.

THE COURT: All right.

Q. That leads me to my next question, Mr. Bisceglia—

THE COURT: Well, I'm not trying to help you, Mr. Watson.

MR. WATSON: Yes, Your Honor.

THE COURT: I'm trying to learn something.

Q. —is it conceivable that if these records were produced for the period October 22 through November 13 at the rate of approximately 1800 to 2200 deposit tickets and/or cash tickets a day, that the information which Mr. Brutscher seeks might still be indetermined?

MR. SNOW: Objection. That calls for a conclusion of the witness, Your Honor.

THE COURT: Overruled.

[56] Q. Do you understand my question?

A. Would you repeat the question.

THE COURT: Well, Mr. Watson, isn't it implicit in what we've already been through if there was an exchange there wouldn't be a record? Otherwise, there would be.

MR. WATSON: Yes, Your Honor.

THE COURT: All right.

Q. It is possible to check all these records and you still wouldn't know where this money came from?

A. It's possible if it was an exchange.

Q. In order to produce the records which Mr. Brutscher wants, how would the Bank go about it? Who would get him the records?

A. Well, what we would do would be to let him look at the film in our presence.

Q. Just let him run through the microfilm records?

A. That would be the only thing I would know to do.

Q. As to the cash tickets, do the cash tickets show the name of the person on the ticket that received money out of the bank?

[57] A. No, just the amount.

Q. Just the amount?

A. Yes, sir.

Q. Would it show the identity of the teller who handled the particular cash transaction?

A. Yes, sir, it would show either the Number 1 teller, Number 2 or Number 3.

THE COURT: How many tellers do you have in the bank?

A. Let's see, we have 4—5 in the main office, 4 at the East end branch, and 1 at the shopping center branch.

Q. All right, now, your East end branch was open at the time in question, wasn't it?

A. No, sir—you mean, the shopping center branch?

A. No, I'm talking about your East end branch. When did it open?

A. In November of 1963.

Q. Now, the deposit tickets also bear an identifying stamp for tellers, is that correct?

A. Yes, sir.

Q. And any of the transactions which the Government suspicions took place here could have occurred either at your main bank down town, or at your East end [58] branch?

A. Yes, sir.

Q. And could have been handled by any one of 9 tellers?

A. Yes, sir.

Q. Are all of the tellers that were with your bank in 1970 still with the bank?

A. No, sir.

Q. What kind of a turn-over have you had?

A. Well, we—the Number 1 teller in the main office left the bank and went to work at the Social Security office, and the head teller at the East end branch was transferred—her husband was transferred and she left —approximately, maybe two more—between 4 and 5.

Q. In addition to those men or women who regularly work as tellers do other people stand in for them at the windows?

A. I don't follow you.

Q. In other words, are people substituted at the tellers' windows when the regular teller is gone?

A. Yes, sir.

Q. Who might they be?
A. Well, they would be the alternate tellers.
Q. They have regular jobs elsewhere in the [59] bank?
A. Yes, sir.
Q. Are all the bank employees trained to fill in as tellers if necessary?
A. No, sir.
Q. What percentage of them are trained for that purpose?
A. I would say, maybe, forty (40%) percent.
Q. Do they have their own identification stamp, or do they use the stamp that goes with that window?
A. They use whatever stamp is at the window.
Q. Approximately how much time would it require to go through the records that Mr. Brutscher wants to be produced?
A. I would have no idea. It may be hard to say. I don't know what all would be incurred.
Q. The way the cash is received in the bank is there any guarantee that the money which was received on the 6th and 16th of November, 1970 was actually received during the period October 22 to November 13th?
A. I don't know.
Q. Could it have been received prior to October 22 but not sent out until after the—
MR. SNOW: Objection. The witness was asked to answer [60] that question by his previous answer.
THE COURT: Read it back to me, please.

(Reporter reading: "Could it have been received prior to October 22 but not sent out until after the—").

THE COURT: Overruled.
Q. Did you hear the question?
A. Well, I don't know the method of Mrs. Sufferidge sending out the currency.
Q. You are not familiar with that?
A. No, sir.
MR. WATSON: I believe you may ask him.

CROSS EXAMINATION

BY MR. SNOW:

Q. Mr. Bisceglia, you have indicated that you do not know who the depositor, or depositors, were, or who the exchanger was, is that correct?
A. Yes, sir.
Q. Do you know or have any information as to anyone who does have information as to the source of the funds?
A. No, sir.
Q. This case has been pending for some time, [61] have you asked any of the employees down there to look into the matter?
A. No, none other than Mrs. Sufferidge.
Q. Sir?
A. No one other than Mrs. Sufferidge.
Q. And what information, if any, did she give you?
A. Well, she hasn't given me any.
Q. She hasn't responded to your request at this time?
A. Well, she was working with Mr. Brutscher.
Q. Well, sir, you have told us that normally speaking you have two branches, and I understand, 9 tellers, is that correct?
A. Yes, sir.
Q. And, of course, you have records in the bank as to who the tellers were and for what time—that is, for what periods they worked, do you not?
A. Yes, sir.
Q. So you can go back to these records and find out who the tellers were between October 22nd and November 13th, can you not?
A. Yes, sir.
Q. Counsel asked you a question with reference to turning in of $100 bills. We have heard testimony already [62] that prior to November 6th your bank, the two branches, had turned in to the Federal Reserve exactly $21,800, is that right?
A. Well, I don't know.

Q. That's the testimony. The question is, how do you explain, sir, these two shipments of $40,000 within a 10 day period, all of which are the same, and all of which are deteriorated?

MR. WATSON: Object.

Q. Can you explain that?

THE COURT: Well, the objection is sustained to the form of that question.

Q. Do you have any knowledge, sir—let me re-phrase—as to the two particular shipments, and the person I am concerned about—the two $20,000 shipments in $100 bills occurring immediately prior to November 6th and 16th?

A. No, sir.

Q. Has it ever been brought to your attention, sir, that this $40,000 had come into your bank?

A. Well, not to my attention.

Q. To somebody else's attention?

A. Yes, sir, to the operational officer.

[63] Q. And what is his name?

A. Marcum Brogan.

THE COURT: Marcum what, sir?

A. Brogan.

THE COURT: B-r-o-g-a-n?

A. Yes, sir.

Q. And from where did he get his information?

A. I didn't understand the question.

Q. If you know—don't answer if you don't—from where did this gentleman obtain his information?

A. Where did he obtain it?

Q. If you know?

A. I don't follow your question.

Q. Where did this gentleman, sir, get this information with reference to these bills? How did he get it—do you know?

A. I don't know that he got the information.

Q. Was the matter ever discussed with the Board of Directors of the Bank, or the officers of the Bank? It seems rather abnormal.

A. It was brought up after Mr. Brutscher came in, yes, sir.

Q. But not before?

A. No, not to my knowledge.

[64] Q. In other words, the Bank didn't think about it twice the fact that they had received $40,000, until Mr. Brustcher comes in later on in 1971?

A. Yes, sir.

Q. But do you know, sir, contemporaneously with the depositor—these deposits, about this amount—had this been communicated to you?

A. No, sir, not until Mr. Brutscher came in.

Q. Sir, you just told me this other gentleman in your bank had communicated it, isn't that right?

A. No, sir, I must have misunderstood your question. I said he would have been informed if something like that would have been brought up, but to my knowledge nothing was ever brought up.

Q. I'm rather confused, sir. It would seem to me—you are telling the Court, aren't you, that $40,000 comes in in old, deteriorated, "tissue-thin bills" and I quote, and nothing was said to anybody as far as you know?

A. Well, I didn't know anything about it until Mr. Brutscher came in.

Q. Well, sir, how many transactions does that bank have involving $20,000 in $100 bills—how many?

A. I have no knowledge.

Q. Probably none, or close to none, is that [65] correct?

You've been Vice President there for a number of years—

THE COURT: Wait a minute—wait a minute, Mr. Snow. You asked him a question and then you started on another one without letting him answer.

What was the answer to the other question, Mr. Bisceglia?

A. Which question is that?

THE COURT: Read back the one that wasn't answered.

(Reporter reading: "Probably none, or close to none, is that correct?")

THE COURT: What's your answer to that?

A. Well, it would be, on a commercial deposit there may be a few.

MR. SNOW: May I hear that, Madam Reporter. I didn't hear his answer.

(Reporter reading: "Well, it would be, on a commercial deposit there may be a few.")

MR. SNOW: A few?

[66] A. A few in a year's time.

Q. You have been in the banking business, sir, is it your believe that the Federal Reserve is a specialist in these matters? Would you go to them, sir, if you had any questions as to money—counterfeit money?

A. Yes, sir.

Q. Do you have any reason to doubt, sir, this gentleman's word that this money was deteriorated and in an unusual condition?

A. No, sir.

Q. Would not you be curious as to the source of this money—this $40,000.

A. No.

Q. You would not be curious as to this $40,000 even though your bank had only shipped up to that bank $21,800 prior to the end of the year, and then on 2 dates, as part of bigger shipments, to send up $20,000 a piece on the 6th and 16th, all the same, you wouldn't be curious?

A. Well, under my present position I wouldn't have any knowledge of it.

Q. But that is not my question, sir: Wouldn't you be curious, as a bank official, and as a citizen?

MR. WATSON: I'm going to object, Your Honor. I don't [67] think whether he would be curious or not curious is really relevant to this question.

MR. SNOW: I would like to hear the answer, Your Honor.

THE COURT: Well, the objection is sustained as to the form of that question. He says he doesn't handle that part of the bank business.

Q. Did the Special Agent, sir, explain to you that the Internal Revenue Service would cooperate with you in

every respect as far as determining the source of this $40,000?

A. Yes, sir.

Q. Did he further explain to you that they would accept your representation to them as to the source?

A. Yes, sir.

Q. Do you understand, sir, that we would still agree to this method?

A. Yes, sir.

Q. And, of course, sir, in your office you can ask the bank people to make a search of their records and make such a determination, can you not?

A. Yes, sir.

[68] Q. And it may well be that it may turn up right away or it may take a long time, may it not?

A. Yes, sir.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 73-1245

UNITED STATES, ET AL., PETITIONERS

v.

RICHARD V. BISCEGLIA

ORDER ALLOWING CERTIORARI—Filed April 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

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Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, Et Al., - Petitioners

versus

RICHARD V. BISCEGLIA - - - Respondent

RESPONDENT'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, ET AL., - *Petitioners*

v.

RICHARD V. BISCEGLIA - - - - *Respondent*

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent replys to the petitioners' writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTERSTATEMENT OF QUESTION PRESENTED

The government's statement of the question presented is incomplete and therefore misleading because it is not framed within the context of the specific facts and circumstances of this case. A more accurate statement of the question presented, when considered in light of the undisputed facts in this case, is as follows:

> Whether a Special Agent of the Internal Revenue Service has the authority under Section 7602 of the Internal Revenue Code of 1954 to issue a "John Doe" summons against a bank which re-

quired the bank to produce records pertaining to a designated class of transactions which the bank *may* have had with its customers, when the Special Agent admits that the "taxpayer" named in the "John Doe" summons is both an unknown person and ficticious; and that no person or persons is under investigation; and at that time the investigation was, at most, a mere inquiry into a "situation" the government thought was circumspect.

Alternatively, but only in the event that this Court would grant the writ, a second issue is presented, one not decided by the Sixth Circuit, and it is as follows:

> Whether the Section 7602 summons the trial Court ordered to be enforced constituted an unreasonable search under the Fourth Amendment.

COUNTERSTATEMENT OF THE CASE

At the evidentiary hearing below, it was established that Special Agent B. L. Brutscher issued an Internal Revenue summons under Section 7602 on Treasury Department Form 2039 which required the Vice-President of the Commercial Bank of Middlesboro to appear before the Special Agent at a time and place specified therein and to give testimony relating to the tax liability of "John Doe". The wording of that summons in pertinent part is as follows:

> "SUMMONS
>
> In the matter of the tax liability of
> *John Doe*
>
> Internal Revenue District of Louisville
> Period 1970

> The Commissioner of Internal Revenue
> To Richard V. Bisceglia, Executive Vice President, Commercial Bank
>
> At Middlesboro, Kentucky
>
> Greetings: You are hereby summoned and required to appear before B. L. Brutscher an officer of the Internal Revenue Service, *to give testimony relating to the tax liability or the collection of the tax liability of the above named person* for the period designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:
>
> Those books and records which will provide information as to the person(s) or firm(s) which deposited, redeamed [sic] or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 16, 1970." [Emphasis supplied.]

Special Agent Brutscher testified on cross-examination that the "taxpayer" designated as "John Doe" in the 7602 summons was ficticious and that no "taxpayer" by that name either existed or was under investigation.

It was also established at the same evidentiary hearing that certain records of the bank would not disclose or reveal the identity of the person or persons who had made or may have made the exchange of the currency in question. In short, the testimony disclosed that there was probably no way to connect the "situation" which was the subject of the government's inquiry with a bank customer.

Prior to the time this case was actually decided by the Sixth Circuit on appeal, a three-judge panel for the Northern District of California issued an opinion which is of extreme importance in this proceeding. This case was *Stark* v. *Connally,* 347 F. Supp. 1242 (1972), and was concerned with the constitutionality of the Bank Secrecy Act which became effective on July 1, 1972.

This legislation authorized the Secretary of the Treasury to require domestic financial institutions to report any currency transaction involving more than $10,000.00 with any customer. The purpose of those reports were to be used as a surveillance device for the possible detection of wrong-doing on the part of bank customers since the information disclosed by the reporting requirements of the Act had a high degree of usefulness in criminal, tax or other regulatory investigations.

After considering the question of the Act's constitutionality, the three-judge Court in *Stark* held that the reporting requirements required by the Bank Secrecy Act were unconstitutional under the Fourth Amendment. The basis of the Court's opinion was

predicated upon the premise that customers of a bank were entitled to some measure of privacy and that the reporting requirements of the Act violated those rights. Thus, the Court condemned the government's right to survey third party records when a particular person was not under investigation.[1]

The holding in the *Stark* case, which has subsequently been appealed to the Supreme Court (Docket No. 72-1196, argued January 16, 1974) taints the report made by the Federal Reserve Bank to the Internal Revenue Service in the case at bar. If the report required by 31 CFR Section 102.1 admitted to an unreasonable search in contravention of the bank customer's Fourth Amendment rights, then the Internal Revenue Service obtained the information which initiated these proceedings unlawfully, and it is not permitted, therefore, to use such as a lead upon which to predicate the issuance of the administrative summons in this case. [*Katz* v. *United States,* 389 U. S. 347, 19 L. Ed. 2d 576 (1967); *Wong Sun* v. *United States,* 371 U. S. 471, 9 L. Ed. 2d 441 (1963); *Fahy* v. *Connecticut,* 375 U. S. 85, 11 L. Ed. 2d 171 (1963)].

Moreover, the *Stark* disclosure agrees with the conclusion reached by the Sixth Circuit in the case at bar because the Court in *Stark* said that a valid Section 7602 summons may only be issued to secure *relevant* and *material* matter then under inquiry—the correct-

[1]Access to third party records must be relevant and material to the inquiry. Thus, there must be some reasonable relationship between the regulated activity and the public interest. The Court said in *Stark* that no such relationship existed and issued a preliminary injunction against the Secretary of Treasury enjoining him from enforcing the *domestic* reporting provisions of the Act.

ness of a particular taxpayer's return.[2] In short, the requisite tests of relevancy and materiality when predicated and conditioned upon the existence of a particular taxpayer.

The Senate hearings which were held in regard to the Bank Secrecy Act contained pertinent information in regard to established Internal Revenue policy for the issuance of Section 7602 summonses. The relevant portions of those hearings and the official government policy to which we refer will be set out and discussed in detail below.

REASONS WHY THIS WRIT SHOULD BE DENIED

The government is seeking to invoke the jurisdiction of this Court upon one of two alternative grounds. The first predicate is based upon the statement that a conflict in the several Circuit Courts exists as to whether the Internal Revenue Service is authorized to issue a Section 7602 "John Doe" summons when a particular taxpayer is not under investigation. The alternative second ground of the government is based upon the "great importance question". The respondent-bank strongly contends that both of the government's contentions are incorrect.

[2]At page 1249, the Court said:

"Section 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summon the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry."

I. There Is No Conflict Among the Several Courts of Appeals in Respect to the Issue By the Sixth Circuit in This Case.

The decision of the Sixth Circuit in the case at bar was approvingly cited and followed by the Fifth Circuit in its decision rendered on January 18, 1974, in the case of *United States* v. *Humble Oil & Refining Company,* 488 F. 2d 953, which affirmed a District Court opinion set forth and contained in 346 F. Supp. 944 (1973). Both cases refused to sanction the use of a Section 7602 summons for mere information gathering purposes. The basis for the decision by the Fifth Circuit arose out of facts similar to the ones here. In *Humble Oil* the revenue agent conceded that at the time he issued the summons against the Humble Oil Company that he had not initiated an investigation of any of Humble's lessors, i.e., no particular taxpayer was under investigation when the summons was issued.

The Internal Revenue Service argued in *Humble, supra,* that the scope of a Section 7602 summons must be read in conjunction with Section 7601, which imposed a duty upon the Internal Revenue Service "to canvass and to inquire".[3] The Fifth Circuit challenged the government's position head-on and it was rejected. It said a Section 7602 summons could not be used to canvass and explore third party records when no par-

[3]In rejecting the Internal Revenue Service's position and deciding the case in favor of the Humble Oil Company, the Fifth Circuit said that it confined its opinion to the question of whether the government had exceeded its statutory authority when it issued the summons under Section 7602. This restraint was a self-imposed one and resulted in a refusal by the Court to consider whether the summons was too broad to warrant enforcement.

ticular taxpayer was under investigation. In doing so it approved and followed the rationale of the Sixth Circuit in the following manner [488 F. 2d 962]:

> "* * * In *Bisceglia,* the IRS issued a summons to the vice president of the Commercial Bank of Middlesboro, Kentucky which had deposited $20,000 in one-hundred dollar bills in a Federal Reserve Bank. These bills, being paper thin and apparently held for a long period of storage, were suspected of not having been reported for income tax purposes by the depositors at the Commercial Bank. It was uncontroverted that the IRS neither suspected nor was investigating a particular person or identified taxpayer but merely sought to ascertain first the depositor's identity and only then whether any income tax delinquency had occurred. In maintaining that section 7602 would not support the issuance of the summons, the Sixth Circuit reasoned that:
>
> > 'In this section, Congress has not authorized the IRS to examine records pertaining to the financial affairs of an indefinite number of unspecified persons for the purpose of ascertaining the identity of one or some of those persons who may be taxpayers and liable for taxes.'
>
> *Bisceglia* v. *United States, supra,* 486 F. 2d at 710. We believe that *Mays* and *Bisceglia* constitute the more compelling view."

This conclusion was based in part upon an analysis of the specific language of Sections 7601 and 7602. The Court in *Humble* said that the government was wrong in maintaining that the commissioner's authority under

Section 7602 was coterminous with the power to "canvass and inquire" under Section 7601. In arriving at this conclusion the Court correctly said [488 F. 2d 960]:

> "Our starting point is a comparison of the language contained in the two sections. Section 7601 empowers the Secretary of the Treasury or his delegate to *make inquiries* concerning all persons who may be liable to pay any internal revenue tax. Section 7602, on the other hand, authorizes the IRS to *examine* books and records for the purpose of ascertaining the correctness of any return and the making of a return where none has been filed. The distinction between a section 7601 inquiry and a section 7602 examination, though perhaps elusive when these words are viewed in a vacuum, becomes more salient when one considers first, that the inquiries are to be conducted of 'all persons' while examinations are to be made of 'any person', and second, that the inquiries may occur to the extent the Secretary deems it practicable and from time to time while the examination may occur for the purpose of ascertaining the correctness of any return. The language variances in these two sections amplify the attributes we ascribe to the differing IRS functions contemplated by sections 7601 and 7602 and confirm our observation that the canvass power can be employed rather cavalierly while the summons power can be utilized only when IRS scrutiny of a taxpayer or a group thereof becomes particularized or focused. We agree with the district court that '[t]here must be some nexus between information sought and a specific investigation of specific individuals before

> the government can compel third parties, at their own expense, to give information to the Internal Revenue Service.' *United States* v. *Humble Oil & Refining Company* [73-1 USTC ¶ 9255], 346 F. Supp. 944, 947 (S. D. Tex. 1972). Before a section 7602 summons may issue, the IRS must have traversed the data gathering stage and initiated an investigation."

The Fifth Circuit Court also distinguished, limited, and placed within its proper perspective, the decision of the Seventh Circuit in *Tillotson* v. *Boughner*, 333 F. 2d 515 (1964). First, the Court said that the language in the *Tillotson* case upon which the government relied was dicta. Second, the Fifth Circuit said that the *Tillotson* decision did not give sufficient weight to the language variances between Sections 7602 and 7601. Finally, the Fifth Circuit approvingly followed the basis upon which the Sixth Circuit in the case at bar had distinguished the *Tillotson* decision. The factual differences between *Tillotson* and the case at bar are best summarized from the language in the Sixth Circuit opinion which said [486 F. 2d 712]:

> "We believe, therefore, that *Tillotson* v. *Boughner*, 333 F. 2d 515 (7th Cir.), *cert. denied* 379 U. S. 913 (1964) and the related case of *Schultz* v. *Rayunec*, 350 F. 2d 666 (7th Cir. 1965), cited by the IRS, are inapposite. In those cases, the court ordered enforced section 7602 summonses issued to a third party bank and an attorney during an investigation in which the IRS sought the identity of the person for whom the attorney had obtained a cashier's check for $215,499.95 from the

> bank. The attorney had sent the check to the IRS accompanied by a letter that informed the IRS that the check was for unpaid taxes owed by an anonymous taxpayer. The IRS sought his identity from the attorney, whose claim of attorney-client privilege was upheld in *Tillotson* v. *Boughner*, 350 F. 2d 663 (7th Cir. 1965), and from the bank, which was ordered to disclose the identity of the taxpayer whose money had been used to purchase a cashier's check from it. The court, in the earlier *Tillotson* case, was careful to distinguish the *Mays* case, *supra*, on the ground that in *Tillotson* not only did '*a* taxpayer' exist but also that the bank was requested to assist in determining that 'specific taxpayer's liability.' 333 F. 2d at 516. (Emphasis in opinion). The court did not sanction an examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation."

The difference and distinction between the issuance of a Section 7602 summons in conjunction with the government's Tax Preparer Project and the situation in the case at bar are worlds apart.

In those cases where a "John Doe" summons has been sustained against an income tax return preparer, the Internal Revenue Service has first sent an undercover agent posing as a customer to the preparer for the purpose of having an "income tax return" prepared. In each and every instance, of which the respondent is aware, the return which was furnished by the preparer to the undercover agent was incorrect, or the tax preparer had failed to sign the returns as required by Section 6065 of the Internal Revenue Serv-

ice Code. It is of great significance that only *after "setting-up" the preparer* did the Commissioner then seek to secure from the tax preparer a list of his clients in order to determine whether additional sums were due the government by the taxpayer-preparer's customers.

For example, in the case of *United States* v. *Berkowitz,* 488 2d 1235, the Third Circuit distinguished the use of a "John Doe" summons in a Tax Preparer Project case from the situation which is presented in the case at bar. Moreover, the Third Circuit in *Berkowitz* specifically referred to the Bisceglia decision and said that there was no conflict between the respective cases because the facts were different.

The respondent does not agree, therefore, with the government's allegation that a conflict exists among the several circuits on the question presented. The reason for this position is rather straight forward and simple. First the Fifth Circuit in *Humble* specifically approved and followed the Sixth Circuit decision in *Bisceglia.* Moreover, the Third Circuit in *Berkowitz* specifically distinguished *Bisceglia* and said that there was no conflict between the holdings of the two cases. The government has failed then to establish a valid ground for this Court to invoke its jurisdiction to grant the Writ, and the government's asserted jurisdictional prerequisite is obviously not a tenable one.

II. Official Treasury Pronouncements in 1970 Before the Subcommittee On Financial Institutions of the Committee On Banking and Currency of the United States Senate Establish That the Internal Revenue Service Must Have a Particular Taxpayer Under Investigation Before It Is Authorized to Issue a 7602 Summons Against a Third Party and That a Blanket Right to Survey a Bank's Records Was One the Government Confessed It Did Not Possess.

During June of 1970, the Subcommittee on Financial Institutions of the Senate Banking and Currency Committee held hearings in respect to H.R. 15073 and S. 3678 which resulted in the passage of the Bank Secrecy Act, now encoded at 12 USC §1829(b) and 31 USC §§1051-1122.[4] Although this Act has been subsequently held to be unconstitutional by the three-judge District Court in California in the *Stark* case, *supra,* the testimony and prepared statements from Eugene T. Rossides, Assistant Secretary for Enforcement and Operation, Department of Treasury, is instructive from the standpoint of expressing the official traditional view of the scope of a Section 7602 summons.

In reviewing the Administration's proposals in the area of foreign bank secrecy, before the Committee, the Secretary said the Department and the Administration were concerned with three fundamental and competing interests. [Hearings, p. 148].

The first was that the U. S. dollar was and is the principal reserve and financial transaction currency

[4]Hearings on S. 3678 before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 91st Cong., 2d Sess; at page 147 et seq. (1970).

of the world market and that the dollar's integrity as an international medium of exchange must be maintained. [Hearings, p. 148]

The second was concerned with the government's objective to deter tax evasion by U. S. citizens in the foreign transaction area and to develop proposals that would benefit the collection of revenue. [Hearings, p. 148]

But the Secretary also said that the third basic concern of the Treasury Department in the Administration was to insure and guarantee that the new and enlarged reporting requirements of the Act should be made within the framework and with due regard to this country's traditional and constitutionally guaranteed freedoms. In expressing this concept to the Committee, the Secretary said [Page 149]:

> "Finally, the third basic thought that has been in our minds, and a very important one, is that we have kept firmly in view our traditional freedoms, such as the constitutional prohibition against unreasonable searches and seizures and the right of our citizens to privacy."

Further on in this testimony, the Secretary commented on the domestic and international record keeping requirements of the bills which were before the Committee. He said that the question of access to records in the possession of a third party, in this particular case a bank, had to be governed under the same standards as those which were being used currently on the domestic scene. His explanation of these present

requirements, in this context, in regard to the foreign international disclosure requirements, was as follows [Page 153]:

> "Getting back to international transactions recordkeeping, there are two aspects that I want to stress. You have recordkeeping and then, first, the question of access to the records. *Access to these records would be under the normal legal processes that are in being currently—the various discovery procedures and the protections that are involved with respect to access in regard to a particular taxpayer.*
>
> The other aspect is possible reporting requirements. You can have recordkeeping and access *in a particular taxpayer investigation. The other possibility is to make the taxpayer's banks report all of the transactions to the Government and then the Government can then browse through those records in its own warehouse or office.*" [Emphasis supplied]

The Secretary was unequivocal. He said a "particular taxpayer" must first be under investigation before the government was entitled to have access to third-party records. In the very next paragraph the Secretary said that the proposed Sections 241 and 242 of the Bank Secrecy Act would violate these traditional notions of access to taxpayers' records, and he opposed these provisions and said so in the following manner:

> "This has been under very careful study; it involves one of the key provisions of the bill, sections 241 and 242, *which we oppose, because of*

questions on which we feel quite strongly, unconstitutional searches and seizures, and the right to privacy.

I would like to read that section, Senator, because it is important, and it does—"

After so testifying, the Secretary read from the Administration's prepared statement. Much of the prepared statement is so cogent to the resolution of the jurisdictional aspects of this case, that the liberty is taken to quote from it at length [173-174]:

"If the Internal Revenue Service could survey the foregoing records of international transactions, either by examining them on the premises of the bank or other financial institutions or by requiring information returns as to some of the contents of the records, the usefulness of the records in providing initial leads to cases of possible tax evasion would be enhanced. *Such surveys, however, would extend the utilization of the records beyond their traditional role as a source of information and evidence in an examination of a particular taxpayer.*

The Internal Revenue Code authorizes the Internal Revenue Service to obtain and examine records maintained by banks and others *in connection with the determination of the tax liability of particular taxpayers. There is also a statutory basis for arguing that the Internal Revenue Code authorizes the use of compulsory process for a survery of the records of a financial institution located in the United States. Nevertheless, the Internal Revenue Service has not generally asserted such survey authority, the scope of which has not been reviewed by the courts.*" [Emphasis supplied]

It is very obvious that in the case at bar the Internal Revenue Service has attempted to assert a general survey authority against the respondent-bank's records even though the tax liability of a particular or specific taxpayer was not under investigation when the Special Agent issued the Section 7602 summons. Therefore, it is clear that the government has attempted to, in this proceeding, expand the traditional role of a Section 7602 summons beyond the limits of record access described by the Secretary in his testimony and prepared statement.[5]

Back to the Secretary's prepared statement. Again, the administration refers to the constitutional prohibition against unreasonable searches and seizures and the need to avoid violations of a customer's right to privacy. The Secretary did so with this language [p. 174]:

"We decided against seeking specific statutory authority extending the rights of the Internal Revenue Service to survey the records of international transactions in banks and other financial institutions. In deciding this, we considered the constitutional prohibition against unreasonable searches and seizures and the need to avoid unnecessary incursions against the right of privacy.

[5]It is assumed that the government's "statutory basis" for arguing that the Internal Revenue Code authorizes the use of compulsory process for a survey of records of financial institutions, was based upon its construction of Section 7601 of the Internal Revenue Code which it has presented to this Court in its brief in the case at bar. Of course, this position was soundly rejected by the Sixth Circuit in the case at bar and by the Fifth Circuit in *Humble, supra*, on a very rational and correct basis.

While it is clear that obtaining records by established discovery procedures from the banks and other institutions in connection with the examination of a particular taxpayer would not violate these rights, provision for a survey of such records raises a much more serious questions. We are also concerned that surveys or information returns could have an adverse effect on legitimate foreign investment in the United States. It has been the tradition overseas to place great emphasis on the privacy of financial transactions and a breach of this tradition could adversely affect the flow of foreign funds to the United States.

Balancing these factors, we concluded that it would not be appropriate for us to suggest legislation extending the rights of the Internal Revenue Service to survey the records of banks and other institutions.

Next we considered the approach taken in sections 241 and 242 of S. 3678 and H.R. 15073 which could be used to accomplish the same result by requiring banks and other financial institutions to file information returns setting forth the information contained in the international records. *For the same reasons that we have concluded that we cannot support new legislative authority for the survey of records not tied to a particular taxpayer investigation, we believe it inappropriate to support legislation requiring reports of information obtained from the records of international transactions. Since sections 241 and 242 of the bills authorized such reports, we cannot support their inclusion unless they are substantially amended . . .*" [Emphasis supplied].

It is readily apparent from the foregoing testimony that Special Agent Brutscher was unaware of the official policy of the Treasury Department in respect to the purported right of the Department of Treasury to survey a third party's records when he did not have the particular taxpayer under investigation. The testimony of the Secretary and the official prepared statement of the Administration which was placed in the Committee's report must be taken as expressing a contrary policy position from that which was set forth in the government's petition before this Court. The fact of the matter is that the testimony of the Secretary is much stronger than a mere statement that the traditional role of a 7602 summons has been limited to surveying records when a particular taxpayer is under investigation because in the proceedings before the Senate the Administration specifically said it would not support any new legislative authority which would authorize the government to survey records which were not tied to a particular taxpayer.

Within this context, then, it is manifest that since the government refused to support legislative authorization to survey the records of a third party not tied to a particular taxpayer that they should not be permitted to say now, before this tribunal, that the records they seek here from the Commercial Bank of Middlesboro are within the scope of their authority to request.

It is easy for the government to take inconsistent positions. The respondent contends, however, that

these admissions and statements of official policy before Congress should be considered as reflecting an unbiased evaluation of the scope of a Section 7602 summons. Obviously, it is commonplace that adversaries in a judicial proceeding over-react and overstate their case. When the government's brief before this Court is considered in the context of the foregoing disclosures, before Congress, it is very apparent that the opinion of the Secretary and the Administration upon the traditional scope and role of the Section 7602 summons was made in the environment of attached objectivity, and represents, therefore, the more correct and rational view of the statutes the government seeks to enforce in this proceeding.

Accordingly, this Court should not grant this writ because no conflict exists among the several circuits in respect to this issue and because the policy question in regard to the enforcement of revenue laws has been clearly set forth by the administration before Congress to be a contrary one from that set forth in the government's brief before this Court.

Respectfully submitted,

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March 13, 1974

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In the Supreme Court of the United States

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v.

RICHARD V. BISCEGLIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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This memorandum is filed in reply to respondent's contention (Br. in Op. 13-20) that our position in this case conflicts with the views expressed by Assistant Secretary of the Treasury Rossides during Senate hearings on the Currency and Foreign Transactions Reporting Act, Pub. L. 91-508, 84 Stat. 1114.

Respondent's contention is bottomed upon two related assumptions—that Assistant Secretary Rossides conceded in his testimony that internal revenue summonses could not be used to conduct a general survey of a bank's records and that the summons here represents an attempt to conduct such a survey. Respondent errs in both assumptions.

First, the Assistant Secretary nowhere conceded that the scope of the Internal Revenue Service's summons power was limited in the manner claimed by respondent.

To the contrary, the Assistant Secretary pointed out that it is at least arguable that the Service has statutory authority to employ "compulsory process for a survey of the records of a financial institution." Subcommittee on Financial Institutions, Senate Committee on Banking and Currency, *Hearings on S. 3678 and H.R. 15073*, 91st Cong., 2d Sess. 154, 174. His "concession" was merely that such use of the summons power would raise a "serious question" (*id.* at 154) under the Fourth Amendment. He did not, however, purport to resolve that constitutional question. But cf. *California Bankers Assn.* v. *Shultz*, No. 72-985, decided April 1, 1974. Thus even if the Service were here asserting a general survey authority, such an assertion would not conflict with the Assistant Secretary's description of the scope of the summons power.

But there is no question here of any such general survey of a bank's records. In arguing that the Service has exceeded its statutory powers, respondent has completely misconceived the nature and breadth of the summons in this case. The summons was issued to determine from whom the Commercial Bank of Middlesboro, Kentucky, had acquired four hundred badly deteriorated one hundred dollar bills, and the records sought were "deposit tickets reflecting cash deposits in the amount of $20,000.00 during the period from October 16, 1970, through November 16, 1970, plus * * * deposit tickets reflecting * * * cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period" (Pet. App. A, p. 5a). Thus the Service was requesting not "general access to recordkeeping" (*Hearings, supra*, at 154) but rather only the production of a very limited set of records.

Respondent greatly stresses the fact, acknowledged by the Assistant Secretary (*id.* at 154, 174), that internal revenue summonses ordinarily are used in connection with examinations of particular taxpayers. Of course, as we indicated above, the Assistant Secretary did not concede that the summons power could be used only in connection with such examinations. But respondent in any event errs in contending that the Service has proceeded in this case without focusing on particular taxpayers. The particular taxpayers under investigation are the persons or person who transferred the one hundred dollar bills to the Commercial Bank. Respondent's basic reliance is on the fact that the identity of the taxpayer or taxpayers in question has not yet been discovered by the Service. But the Assistant Secretary never suggested that determination of the identity of the taxpayers subject to examination was considered to be a prerequisite to issuance of a summons. Any such suggestion would of course have been incorrect. Issuance of "John Doe" summonses to banks in aid of investigations of unidentified taxpayers was a recognized practice at the time the Assistant Secretary testified. See, *e.g.*, *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7), certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919.

In short, Assistant Secretary Rossides did not disavow the use of "John Doe" summonses, and it is the general validity of such summonses which is at issue here.

For the reasons stated above and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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OPINIONS BELOW

The opinion of the district court (Pet. App. A 1a–5a) is not officially reported. The opinion of the court of appeals (Pet. App. B 6a–22a) is reported at 486 F. 2d 706.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 23a–24a) was entered on October 18, 1973. A petition for rehearing was denied on November 16, 1973 (Pet. App. D 25a). The petition for a writ of certiorari was filed on February 13, 1974, and was granted on April 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

STATUTES INVOLVED

Sections 7601 and 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7601 and 7602, provide in pertinent part as follows:

> SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.
>
> (a) General Rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.
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> * * * * *
>
> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

This case arises from the issuance of an Internal Revenue summons in the course of an investigation into unusual currency transactions which suggested the possibility of an unpaid tax liability. The currency transactions involved the Commercial Bank of Middlesboro, Kentucky, of which respondent is the Vice-President.

During November 1970, the Commercial Bank on two separate occasions deposited $20,000 in badly deteriorated one hundred dollar bills with the Cincinnati Branch of the Federal Reserve Bank of Cleveland. The bills were "tissue paper thin" (Pet. App. B 7a; A. 18), a condition apparently caused by a long period of storage. Because they were no longer fit for circulation, the Cincinnati Branch of the Federal Reserve Bank destroyed them in the following month (A. 21–22.) In accordance with regular Federal Reserve pro-

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cedures (31 C.F.R. (1972 ed.) 102), the Cincinnati Branch reported the receipt of these bills to the Internal Revenue Service (Pet. App. B 7a–8a, n. 1).

Deposits of large amounts of cash in high-denomination bills by the Commercial Bank to its branch of the Federal Reserve Bank were unusual [1] and it was especially unusual for such bills to be badly worn. Thus the deposit made by the Commercial Bank was considerably out of the ordinary and suggested that substantial transactions may have taken place outside normal financial channels. Moreover, the deteriorated quality of the bills raised the possibility that someone may have been hoarding money for a considerable period of time in an unusual storage place.[2] These facts in turn suggested to the Internal Revenue Service that the receipt of the bills, either by the Commercial Bank's depositor or by the Commercial Bank itself, may not have been properly reported for federal tax purposes (Pet. App. B 12a).[3]

[1] For example, prior to the deposits in question, the Commercial Bank had deposited only 218 one hundred dollar bills during the first ten months of 1970 (A. 24).

[2] The supervisor of the Currency Section of the Federal Reserve Bank who had noticed the deteriorated condition of the bills testified that to the best of his knowledge, "there was only one parallel situation and that was several years ago where a large hoard of money was found that was in comparable condition. It was stored in milk cans that were buried in concrete (Pet. App. B 9a; A. 20). He further testified that the bills involved here were in much worse condition than the average currency that would be classified as unfit (A. 26).

[3] Among other possibilities, the $40,000 suggests the possibility of an amount hoarded by a decedent and not reported by his estate, an amount illicitly received and not reported as income, or the discovery or gift of a cache of money. Thus, the cash may represent an unpaid income, estate, or gift tax liability.

In order to determine whether any unpaid tax liability was associated with the currency deposited by the Commercial Bank, the Internal Revenue Service initiated an investigation and issued a broad summons requesting respondent to testify and bring with him all books and records which would provide information as to the person or persons who had deposited or otherwise transferred the bills to the Commercial Bank. The summons was issued "[i]n the matter of the tax liability of John Doe" because the identity of the potential taxpayer subject to investigation was of course unknown (Pet. App. B 9a–11a). It was contemplated that once the identity of the person was discovered, the investigation would proceed to a determination of his tax liability for the year in question, by inquiring into the means by which the bills had been acquired, and whether that acquisition had been properly reported for federal tax purposes (Pet. App. B 12a; A. 29, 33).

Respondent refused to comply with the summons for him to testify or to produce the requested information.[4] Accordingly, pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, the government filed a petition in the United States District Court for the Eastern District of Kentucky for enforcement of the summons (Pet. App. B 11a–12a). After a hearing, at which an employee of the Cincinnati Branch of the Federal Reserve Bank, a

[4] There is no suggestion that the requested information was unavailable. Respondent testified that the deposit records were recorded on microfilm (A. 37), and there has been no suggestion that his compliance with the summons would cause undue hardship.

special agent of the Internal Revenue Service, and respondent testified, the district court narrowed the summons to require production of only "deposit tickets reflecting cash deposits in the amount of $20,000.00 during the period from October 16, 1970, through November 16, 1970, plus * * * deposit tickets reflecting * * * cash deposits involving one hundred dollar bills totaling amounts equal to or in excess of $5,000.00 per deposit for a like period" and ordered the summons enforced as modified (Pet. App. A 5a).

The court of appeals reversed (Pet. App. B 6a–22a). That court held that Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, which empowers the Service to issue summonses, "presupposes that the IRS has already identified the person in whom it is interested as a taxpayer before proceeding" (Pet. App. B 15a), and that therefore the Service has no statutory authority to issue a summons before it has discovered the identity of the particular person whose transactions it wishes to investigate.[5]

SUMMARY OF ARGUMENT

A

Two provisions of the Internal Revenue Code of 1954, both of which have their origins in the Revised Statutes, support and supplement the accurate and conscientious self-reporting upon which our tax collection system depends. Congress has, in Section 7601

[5] Since it based its decision on statutory grounds, the court of appeals did not reach respondent's alternative contention that the summons constituted an unreasonable search in violation of the Fourth Amendment (Pet. App. B 14a).

of the Code, directed the Secretary of the Treasury or his delegate "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Thus, Section 7602 authorizes the Secretary or his delegate "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] to summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear * * * and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry."

This case arises from the issuance of an Internal Revenue summons in the course of an investigation into unusual currency transactions which strongly suggested the possibility of an unpaid tax liability. Here, the Internal Revenue Service was advised by the Federal Reserve Bank in accordance with regular procedures that the Commercial Bank of Middlesboro, Kentucky, had deposited with the Federal Reserve $20,000 in badly deteriorated one hundred dollar bills on two separate occasions within a single month. Such unusual currency transactions suggested that the person or persons who deposited or otherwise transferred these bills to the Commercial Bank may not have properly reported their receipt for federal tax purposes. Because the identity of the potential taxpayer was unknown, an internal revenue summons was

issued "[i]n the matter of the tax liability of John Doe" seeking production of the pertinent deposit records of the Commercial Bank. Reversing the district court's order enforcing the summons, the court of appeals held that the Internal Revenue Service has no authority to issue a summons prior to its discovery of the identity of the person whose tax liability it wishes to investigate.

That holding would seriously undermine the ability of the Internal Revenue Service to insure that all federal taxes due are reported and paid. In addition to routine audits based upon examination of filed tax returns, the Service must utilize other forms of scrutiny if sources of unreported income and its recipients are to be identified. Enforcement efforts in this regard necessarily involve reliance upon third parties, such as the bank in this case, for information concerning unreported income prior to, and often as an aid to, the Service's discovery of the identity of the particular person under investigation.

Unusual cash transactions are only one example of the situations in which "John Doe" summonses have commonly been issued. They also have been issued to tax return preparers in order to discover the identities of their clients, if the preparer is suspected of having not accurately used the information furnished him. In such circumstances, four courts of appeals have upheld enforcement of the very type of summons issued in the present case. Other investigatory programs similarly depend upon the use of such "John Doe" summonses.

B

1. The decision below is broadly inconsistent with the statutory scheme of the Internal Revenue Code which empowers the Service to ascertain the identities of all persons who may be liable for any taxes. Pursuant to Sections 7801(a) and 7802 of the Code, the Secretary of the Treasury, through his delegate the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. To this end, Sections 6201(a) and 6301, respectively, provide that the Commissioner "is authorized and required to make the inquiries, determinations, and assessments of all taxes" and that he "shall collect the taxes imposed by the internal revenue laws."

Coupled with the statutory duty of the Internal Revenue Service in Section 7601 to inquire after and concerning all persons who may be liable for any internal revenue tax, this panoply of congressional directives necessarily indicates that the Treasury is authorized to discover the identity of an unnamed person through the issuance of a summons. As in other areas of law enforcement, the fundamental question posed to the authorities administering the tax law involves the identification of the responsible parties, *i.e.*, who is liable for additional taxes. The Treasury would not be empowered to make all of the necessary inquiries incident to the fair and effective administration of the tax laws, if its authority did not include the power to ascertain the identities of all persons who may not have fully reported and paid their tax liabilities. Thus, Section 7602, dealing specifically with the summons authority, is most reasonably read as empowering the

Internal Revenue Service to discharge fully its affirmative and wide-ranging duty, imposed by Section 7601, to canvass and inquire after and concerning all persons who may have taxes owing. See *Donaldson* v. *United States*, 400 U.S. 517, 523. Since the summons here was issued in furtherance of a legitimate investigation pursuant to Section 7601, it should be enforced.

2. Section 7602 of the Code empowers the Internal Revenue Service to issue summonses in furtherance of four broad purposes: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax; or (4) collecting any such liability.

The summons served upon respondent falls well within these statutory purposes because knowledge of the identity of the depositor is a critical first step in the initiation of the statutory process to determine whether he is liable for additional taxes. Such an inquiry will be fully grounded upon one or more of the four enumerated statutory purposes. Indeed, by the time the summons was served upon respondent, the Service's investigation had focused on a particular taxpayer who had deposited the bills in question. Thus, the court of appeals' statement that no "particular" taxpayer is under investigation is correct only in the essentially trivial sense that the depositor had not yet been identified by name.

Moreover, the summons power in Section 7602 is broadly phrased, in keeping with the Service's broad responsibilities. The blanket reference to "any return," "any person," and "any such liability" strongly suggest that the Service's authority is not conditioned

upon prior identification of a particular "return," "person," or "liability." Such a broad reading of the statute is also strongly supported by this Court's analysis in *United States* v. *Powell*, 379 U.S. 48, 58, in which the Commissioner's summons power was analogized to the inquisitorial power of the grand jury.

3. The legislative history of the summons power offers strong additional evidence that Congress did not intend to limit enforcement to those cases where the Service has discovered the identity of the taxpayer under investigation. The 1954 codification of the tax law included a combination of previously separate provisions authorizing the issuance of summonses with "no material change from existing law" intended. An examination of the authoritative predecessor provisions, some of which were originally enacted a century ago, demonstrates that the summons authority was cast in the broadest possible terms and that it was understood by Congress to extend to summonses to ascertain the identity of potential taxpayers as well as those seeking information with respect to identified taxpayers.

C

No useful purpose would be served by limiting the summons power to situations where the taxpayer has already been identified. The court below seemed concerned that enforcement of "John Doe" summonses might open the way to fishing expeditions or dragnet investigations. But this Court in *Donaldson* v. *United States, supra*, and *United States* v. *Powell, supra*, has established ample and specific protection against

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an overbroad or otherwise abusive internal revenue summons. No testimonial privilege, constitutional or otherwise, prevents enforcement of the summons in this case, and no other valid interest would be protected by treating "John Doe" summonses as abusive *per se*.

ARGUMENT

AN INTERNAL REVENUE SUMMONS MAY PROPERLY BE USED IN ORDER TO DISCOVER THE IDENTITY OF A PERSON WHO MAY BE LIABLE FOR UNPAID TAXES

A. THE TYPE OF SUMMONS ISSUED IN THIS CASE IS ESSENTIAL TO EFFECTIVE FEDERAL TAX ENFORCEMENT

The issue raised in this case is of great importance to the administration of the internal revenue laws. The Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury, as set forth in Section 7801(a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. Our tax collection system depends primarily upon honest self-reporting. However, in order to support and supplement accurate and conscientious self-reporting by all taxpayers, Congress has directed the Internal Revenue Service in Section 7601 of the Code "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." As this Court observed in *Donaldson* v. *United States*, *supra*, 400 U.S. at 523–524:

> The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the

> Tariff Act of October 3, 1913, § II, ¶ I, 38 Stat. 178, and prior to that, in § 3172, as amended, of the Revised Statutes of 1874.

In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Specifically, Section 7602 authorizes the Secretary or his delegate "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] to summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. Sections 7402(b) and 7604(a) of the Code.

This Court has consistently recognized that effective, and therefore fair, administration of the tax laws requires that internal revenue agents not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liabilities of taxpayers. For example, in *Reisman* v. *Caplin*, 375 U.S. 440, the Court rejected an attempt to obtain injunctive relief against an Internal Revenue summons, holding that the action to enforce the summons afforded an adequate remedy at law in which to challenge the summons.

Similarly, in *United States* v. *Powell*, 379 U.S. 48,

the Court, analogizing the internal revenue summons authority to the broad inquisitorial powers of a Grand Jury (*id.* at 57), held that the Commissioner need not show probable cause to suspect fraud in order to enforce a summons for the production of records, either before or after the three-year limitations period on ordinary tax liability has expired. In *Donaldson* v. *United States*, 400 U.S. 517, the Court held that under Section 7602, an internal revenue summons may be issued in aid of a tax investigation involving potential criminal liability, if it is issued in good faith and prior to a recommendation for prosecution. Most recently, in *Couch* v. *United States*, 409 U.S. 322, the Court, rejecting Fourth and Fifth Amendment claims by the taxpayer, upheld the enforcement of an internal revenue summons directing an accountant to produce business records given to him by the taxpayer.

Like *Powell*, *Donaldson*, and *Couch*, this case arises out of an action by the Internal Revenue Service to enforce a summons seeking the production of records in connection with a tax investigation. Here, the Commercial Bank of Middlesboro, Kentucky, deposited on two separate occasions $20,000 in badly deteriorated one hundred dollar bills with the Cincinnati Branch of the Federal Reserve Bank. In accordance with regular Federal Reserve procedures, the deposits were reported to the Internal Revenue Service.[6] Such

[6] The court of appeals expressed the view (Pet. App. B 9a, n. 1) that pursuant to the same regulations requiring the Federal Reserve Bank to disclose the deposit of cash to the Internal Revenue Service, the Commercial Bank was likewise required to disclose to the Service the information it seeks here. In these circumstances it is difficult to understand the court's refusal to enforce the summons against respondent requiring production of the same information by means of the pertinent deposit tickets.

We note, however, that the banking regulations in force at that time did not contain any sanctions for noncompliance with the reporting requirements. But under the now effective Currency and Foreign Transactions Reporting Act, 84 Stat. 1114, and the regulations promulgated thereunder, each financial institution must file a report concerning each transaction of currency involving more than $10,000. 31 U.S.C. 1081; 31 C.F.R. (1973 ed.) 103.22(a). Furthermore, the Secretary of the Treasury is empowered to assess a civil penalty not exceeding $1,000 for each willful violation of these reporting requirements. 31 U.S.C. 1056(a); 31 C.F.R. (1973 ed.) 103.47(a). The Court recently rejected a constitutional challenge to this Act in *California Bankers Assn.* v. *Shultz*, No. 72-985, decided April 1, 1974.

unusual currency transactions strongly suggested that the person who deposited or otherwise transferred the bills to the Commercial Bank may not have properly reported their receipt for federal tax purposes. Accordingly, the Service issued a summons requesting respondent to provide information as to the identity of the depositor. Because the identity of the potential taxpayer was unknown, the summons was issued "[i]n the matter of the tax liability of John Doe." If the Service had been aware of the identity of the depositor, there is no doubt that the summons requiring respondent to produce the deposit records at issue would have been enforceable. The court of appeals, however, held that the Internal Revenue Service has no authority to issue a summons prior to its discovery of the identity of the person whose tax liability it wishes to investigate.

As we shall discuss in greater detail *infra*, we believe that the court of appeals' confinement of the

Internal Revenue Service's summons power to cases where there has been prior identification of a particular taxpayer has no basis in the language and structure of the Code, which invests broad powers in the Commissioner to make the inquiries necessary to enforce the revenue laws. Our point here is that this unwarranted narrow reading of the statutory summons power would seriously undermine the Service's ability to insure that all federal taxes due are reported and paid.

While the enforcement program of the Internal Revenue Service includes routine audits based upon examination of filed tax returns, a fair administration of the law also requires other forms of scrutiny if sources of unreported income and its recipients are to be identified. In most instances, unreported income cannot be ascertained from an examination of tax returns alone. Indeed, a large number of the recipients of such income fails to file any tax returns. As a result, the Service necessarily must rely upon third parties for information with respect to unreported income. Such investigations are a legitimate and necessary supplement to the examination of returns, and they frequently must proceed without a prior determination of the identity of the person or persons who may be liable for additional taxes.

Cash dealings are of particular concern to the Internal Revenue Service because they offer a means of avoiding the documentary traces left by the usual type of financial transaction which is cleared through one or more banks. While there is of course nothing illegal in using cash as a medium of exchange, the

maintenance of a large sum in cash has always suggested the possibility that the owner has not properly reported its receipt for federal tax purposes. Thus, after it had been advised of the deposit of the $40,000 in cash in this case, the Service was amply justified in seeking from respondent the identity of the depositor in order to pursue its inquiry as to whether the amount had been properly reported by him for federal tax purposes.[7] Moreover, the deteriorated quality of the bills, suggesting that the depositor or some predecessor hid the cash for a lengthy period, also contributed to an inference of possible tax evasion. Despite the strong suggestion that additional taxes might be owed by the owner of the cash hoard, the Internal Revenue Service could not even begin an effective investigation without first discovering the depositor's identity. Indeed, given the sole possession of this critical information by the bank, that identity can most feasibly be ascertained through the use of the power to issue a summons in the name of "John Doe," the unknown potential taxpayer.

Cash transactions of the type presented in this case are but one area in which "John Doe" summonses are commonly issued by the Internal Revenue Service. Tax return preparers are currently the focus of a

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[7] This case is typical of such investigations. For years the Service has investigated suspicious currency transactions reported by the Federal Reserve. For example, during the two-year period 1957–1958, the Service completed 129 fraud investigations, resulting in the assessment of $13,500,000 in taxes and penalties, which were initiated on the basis of Federal Reserve reports. Treas. Release No. A–590, 1959 CCH Stand. Fed. Tax. Rep., par. 6598 (August 3, 1959).

nationwide enforcement effort. This program has frequently involved the use of such summonses upon preparers seeking the identities of, and other information concerning, the preparer's clients in order that the accuracy of their returns may be verified. In such circumstances, four courts of appeals have upheld enforcement of the type of summons issued in this case. See *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Berkowitz*, 488 F. 2d 1235 (C.A. 3), petition for a writ of certiorari pending, No. 73-1175; *United States* v. *Carter*, 489 F. 2d 413 (C.A. 5).

Moreover, "John Doe" summonses are currently being employed in a wide variety of situations seeking the identity of particular persons who may be liable for unpaid taxes. Thus, for example, the Service is currently seeking from an oil company the names of its lessors who received lease bonuses in excess of a certain amount and whose leases expired without production of oil or gas. If the lessees claimed the allowance for depletion on their bonus income, they were obliged to restore to income the amount previously claimed as a depletion deduction. Once the identities of the lessors are obtained by the Service, it can effectively enforce this income-restoration requirement. See *United States* v. *Humble Oil & Refining Co.*, 488 F. 2d 953 (C.A. 5), petition for a writ of certiorari pending, No. 73-1827.[8]

[8] Relying in part on the decision below in the present case, the court of appeals in *Humble Oil* refused to enforce the summons. The government's petition for a writ of certiorari in that case suggests that it be held pending the Court's decision in this case.

Similarly, "John Doe" summonses can be used to ascertain the names of the participants in a "tax shelter" investment which the Service concludes does not offer the tax deductions to the investors which have been promised to them by the promoters.[9] Finally, such a summons can be used to identify the recipients of a wide variety of payments of a legal nature, such as sales commissions or fees, or of an illegal nature, such as kickbacks or bribes. While an audit of the payor's tax returns may identify such payments and result in their disallowance as deductions if they are not satisfactorily explained (see Section 162(c) of the Code), the Service's ability to secure the names of the recipients will insure that they properly report such amounts as income.[10]

[9] A district court recently enforced an internal revenue summons requiring several banks to disclose the names, addresses, social security numbers, and number of shares of the beneficial owners of Hartford Fire Insurance Company stock held by the banks as nominees, trustees, or custodians. The summonses resulted from the Service's revocation on March 6, 1974, of its earlier ruling that a 1970 exchange of Hartford Fire Insurance Company stock for stock of International Telephone and Telegraph Corporation was a tax-free transaction. See *United States* v. *Armour* (D. Conn.) (decided April 25, 1974), 74-1 U.S.T.C. par. 9479. Without the use of the summons to ascertain the identities of these stockholders, the Service would not have been able to assert the deficiencies arising out of the ruling revocation.

[10] See, *e.g.*, *United States* v. *Duke* (N.D. Ill.) (decided May 10, 1974), 74-1 U.S.T.C. par. 9475, where the district court enforced a summons requiring copies of the information returns (Form 1099) issued by Avon Products, Inc., a national cosmetics manufacturer. These forms would disclose the names and payments made to members of the company's sales force, known as "Avon Ladies".

In light of the foregoing, it is apparent that a constrictive interpretation of Section 7602, limiting the use of an internal revenue summons to cases where the person under investigation has been identified, would seriously hamper the Service's special tax enforcement efforts as well as many ordinary investigations into suspected tax abuse. We turn now to an examination of the statutory language, structure and legislative history, all of which support the validity of a properly issued "John Doe" summons.

B. IN LIGHT OF ITS LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY, THE STATUTORY SCHEME FOR THE ISSUANCE OF INTERNAL REVENUE SUMMONSES INDICATES THAT A "JOHN DOE" SUMMONS IS AUTHORIZED TO ASCERTAIN THE IDENTITY OF A TAXPAYER.

1. The statutory langauge and structure

a. Pursuant to Sections 7801(a) and 7802 of the Code, the Department of the Treasury, through the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. Consistent with this responsibility, the Commissioner is "authorized and required" by Section 6201(a), "to make the inquiries, determinations, and assessments of all taxes * * *." Once taxes are assessed, Section 6301 directs that the Commissioner "shall collect the taxes imposed by the internal revenue laws." Finally, in order that these statutory duties may be discharged effectively, Section 7601 empowers the Commissioner to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax

* * *." This broad power to canvass and inquire is the basis of the Internal Revenue Service's ability to obtain much of the information vital to successful administration and enforcement of the tax laws. For, as in any other area of law enforcement, the tax collecting authorities must be able to ascertain the identities of those persons who are liable for additional taxes. Fair and effective administration of our self-reporting tax system requires that the Internal Revenue Service be able to identify those persons who may owe additional taxes.

That Section 7601 immediately precedes the provision authorizing the Internal Revenue Service to issue summonses is not without significance. Indeed, this Court in *Donaldson* v. *United States, supra;* 400 U.S. at 523, recognized the close relationship between the two provisions by including Section 7601 in what it described as "the statutory structure that Congress has provided for the issuance and enforcement of an internal revenue summons." See also *Tillotson* v. *Boughner,* 333 F. 2d 515 (C.A. 7), certiorari denied, 379 U.S. 913; *DeMasters* v. *Arend,* 313 F. 2d 79, 86–87 (C.A. 9). Such summonses are thus one method available to the Service to discharge its affirmative and far-reaching duty under Section 7601 to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." Surely this statutory term "inquire after and concerning all persons" in no way suggests that the Service must identify a particular taxpayer before it can commence a proper inquiry. To the contrary, the broad command of Section 7601 requires the Service to ascertain the iden-

tities of all persons who may have unpaid tax liabilities. There is no reason, we submit, to conclude that while the Service is empowered, and indeed admonished, by Congress to discover the identity of potential taxpayers, it cannot do so by using the basic investigative tool furnished it by Congress—the internal revenue summons—to secure that information from third-party sources, which are often, as here, the only available source.[11]

b. The language of Section 7602 also confirms the existence of statutory authority for the issuance of

[11] In *United States* v. *Humble Oil & Refining Co.*, 488 F. 2d 953 (C.A. 5), petition for a writ of certiorari pending, No. 73-1827, the court expressed the view that the Service's canvass power under Section 7601 is broader than its summons power under Section 7602. It based this conclusion upon the fact that Section 7601 employs the term "all persons" while Section 7602 speaks of "any person." After noting that a Section 7602 summons may be issued for the purpose of ascertaining the correctness of any return, the court stated that "the canvass power can be employed rather cavalierly while the summons power can be utilized only when IRS scrutiny of a taxpayer or a group thereof becomes particularized or focused" (488 F. 2d at 960).

We submit, however, that there is no difference in meaning between the terms "all persons" and "any person" for purposes of this case. Both phrases, in their full statutory context, suggest that the Service may proceed to discover the identity of a potential taxpayer, either by summons or otherwise. The critical error of the Fifth Circuit in *Humble Oil* was, in our view, its confinement of the summons power to cases of ascertaining the correctness of any return. While that situation would necessarily involve a particular taxpayer, Section 7602 also expressly authorizes the issuance of a summons for the purpose of making a return where none has been made, determining the liability of any person for any internal revenue tax, or collecting such liability. In these instances, the identity of the taxpayer may not be known to the Service at the time it commences its inquiry.

"John Doe" summonses. Section 7602 of the Code empowers the Commissioner to issue summonses in aid of four broad purposes: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax; or (4) collecting any such liability. The summons served upon respondent falls well within these statutory purposes because knowledge of the identity of the depositor is a critical first step in the initiation of an inquiry to determine whether he is liable for additional taxes. Thus, after the identity of the depositor is discovered, the inquiry would proceed, under the first statutory purpose, to an examination of his returns to determine their correctness. In the event that the depositor had not filed returns, then the Secretary would make such returns under the second statutory purpose. See also Section 6020 of the Code. The inquiry would also encompass, in accordance with the third and fourth statutory purposes, a determination of the liability of the depositor for additional taxes with respect to the acquisition of the cash hoard and, if such taxes are owed, their collection.

Although the investigatory consequences that would follow from ascertaining the depositor's identity would thus appear to be beyond doubt, the court of appeals viewed the summons narrowly as unrelated to any of the statutory purposes of Section 7602. Only by conceptually isolating the specific request of the summons from the ultimate use to which the identity of the depositor would be put, was the court able to state that the Service "has admitted that it has no

particular taxpayer under investigation and that it desires the records solely for the purpose of obtaining the identities of persons and firms who made deposits of the nature described" (Pet. App. B 20a). But the request of the summons should not be viewed in a vacuum without recognition of the fact that an inquiry grounded in the purposes of Section 7602 will commence once the depositor is identified. Indeed, it is difficult to understand how the court expects the Secretary to ascertain the identity of the taxpayer in situations such as the one presented here, if his broad investigatory tool—the internal revenue summons—is not available for that purpose.[12]

Once the summons in this case is viewed as the initiation of an entire statutory process, it is plain that the court of appeals' observation that "no particular taxpayer" is under investigation is not correct in any sense that is meaningful to the Service's statutory responsibilities. By the time the summons was served, the Service's investigation had focused on a particular taxpayer or taxpayers whose peculiar characteristics were narrowly specified, *viz.*, those persons who deposited amounts of cash equal to or in excess of $5,000 in a single deposit involving one hundred dollar bills during the period from October 16, 1970, through November 16, 1970. It cannot be doubted that such person or persons exist and that their tax liabilities are a subject of bona fide concern to the Internal

[12] The cash transaction reporting requirements discussed in note 6, *supra*, apply, of course, to only one category of the many situations in which "John Doe" summonses are used. See pp. 17–19, *supra*.

Revenue Service. Thus, the court's statement that no "particular" taxpayer is under investigation is accurate only in the essentially trivial sense that the depositor or depositors had not yet been identified by name. The very purpose of the summons was to discover their names in order to proceed with the types of investigation fully countenanced by Section 7602. Indeed, under the court of appeals' view, even in a situation where the Service had conclusive evidence of unpaid taxes and a description of the tax evader, it would still lack the authority to ascertain his name from a third person through its summons process.

Nothing in the statute requires, or even suggests, the narrow construction given it by the court below—that the Service is not authorized to issue a summons to a third party except in furtherance of an investigation of a named taxpayer. The summons power of Section 7602 is broadly phrased, in keeping with the broad enforcement responsibilities it is designed to implement. The blanket references to "any return," "any person," and "any such liability" strongly suggest that the Service's summons authority is not conditioned upon prior identification of a particular "return," "person," or "liability." The second statutory purpose for the issuance of a summons—"making a return where none has been made"—may frequently require investigation of persons who are unknown to the Service because they have failed to file a return.

2. The legislative history

The foregoing analysis of the statutory text as authorizing the issuance of "John Doe" internal revenue summonses is also supported by the pertinent legislative history. At the time of the 1954 codification of the tax law, the report of the House Ways and Means Committee stated that the revisions of the procedural and administrative provisions "represent[ed] a substantial simplification" under which "it has been possible to combine a great number of provisions, shortening them and providing more uniform application for the various internal revenue taxes. H. Rep. No. 1337, 83d Cong., 2d Sess., p. 99. See also S. Rep. No. 1622, 83d Cong., 2d Sess., p. 133; 100 Cong. Rec. 3425. Specifically, the legislative history of Section 7602, the summons power, shows that Congress intended "no material change from existing law." H. Rep. No. 1337, *supra*, at A436; S. Rep. No. 1622, *supra*, at 617. Thus, an understanding of the scope of the earlier provisions governing the power of the Internal Revenue Service to canvass and to issue summonses is essential to any appraisal of the breadth of the present statutory structure.

As the Court noted in *Donaldson* v. *United States*, *supra*, 400 U.S. at 523–524, the duty of the Internal Revenue Service to canvass and to inquire derives from Section 3172 of the Revised Statutes of 1874. Similarly, the summons power, presently set forth in Section 7602 of the 1954 Code, also is rooted in statutes

enacted more than a century ago.[13] The legislative history of Section 7602 shows that the summons power was derived from three separate provisions, *viz.*, Sections 3614, 3615(a)–(c), and 3654 of the Internal Revenue Code of 1939.[14] While the first of these statutes originally appeared in 1919, the latter two had independent roots in Revenue Acts dating back in 1864.

Thus, the "existing law" before the adoption of Section 7602 in the 1954 Code, appeared in part in Section 3614(a) of the 1939 Code, which provided as follows:

> *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return, where none has been made,

[13] Because the 1939 Code also was intended merely to codify existing law with no attempt to effect substantive changes (see, *e.g.*, S. Rep. No. 20, 76th Cong., 1st Sess., p. 1), earlier Revenue Acts must be examined in order to ascertain the meaning of specific provisions of that codification.

[14] See Table II of the 1954 Code, 68A Stat. 969, which notes that Sections 3614 and 3615(a)–(c) of the 1939 Code were essentially carried forward into Section 7602 of the 1954 Code. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 535, referring to Section 7602 as having "ascertainable roots" in Sections 3614(a) and 3615(a)–(c) of the 1939 Code. Although Table II does not contain any reference to Section 3654(a) of the 1939 Code, the inclusion of the summons power in that provision, coupled with the committee reports' statements that Congress intended no material change in existing law, strongly suggests that an examination of Section 3654(a) of the 1939 Code is necessary as an aid to understanding the current scope of the summons power. See Section 7806(b) of the 1954 Code. Moreover, the "close proximity" of Section 3654 to Sections 3614 and 3615, as the Court noted in *Donaldson* (*ibid.*), makes Section 3654 highly relevant in any consideration of the summons authority.

> is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, c. 18, 40 Stat. 1057, 1142, Sec. 1305.[15]

The second part of the "existing law" carried forward in Section 7602 was contained in Section 3615 (a)–(c) of the 1939 Code, which granted a summons power to the collectors[16] by providing in pertinent part as follows:

[15] Neither the committee reports nor the congressional debates contain any reference to the meaning of the 1919 provision.

The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, c. 136, 42 Stat. 227, 310, Sec. 1308; Act of June 2, 1924, c. 234, 43 Stat. 253, 340, Sec. 1004; Act of February 26, 1926, c. 27, 44 Stat. (Part 2) 9, 113, Sec. 1104; Act of May 29, 1928, c. 852, 45 Stat. 791, 878, Sec. 618.

[16] The summons authority was originally given to assessors and supervisors. Act of June 30, 1864, c. 173, 13 Stat. 223, 226, Sec. 14; Act of July 20, 1868, c. 186, 15 Stat. 125, 144, Sec. 49. These offices were abolished and the summons authority transferred to collectors. Act of December 24, 1872, c. 13, 17 Stat. 401, Sec. 1;

> (a) *General authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. * * *
>
> (b) *Acts creating liability.* Such summons may be issued—
>
> (1) *Refusal or neglect to comply with notice requiring return.*—If any person, on being notified or required as provided in section 3611, shall refuse or neglect to render such list or return within the time required, or
>
> * * * * *
>
> (2) *Failure to render return on time.* Whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or
>
> (3) *Erroneous, false or fraudulent return.*—Whenever any person who is required to deliver a monthly or other return of objects subject to tax delivers any return which, in the opinion of the collector, is erroneous, false, or

Act of August 15, 1876, c. 287, 19 Stat. 143, 152. The collectors continued to have the summons authority until the Treasury was reorganized under the Reorganization Act of 1949, 63 Stat. 203. The functions of all Treasury officials were transferred to the Secretary, who was authorized to redelegate all existing authority and the office of collector was abolished. See Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935); Reorganization Plan No. 1 of 1952 (17 Fed. Reg. 2243). The summons in the present case was issued by the special agent pursuant to Delegation Order No. 4 (Rev.) (22 Fed. Reg. 3894). See Treasury Regulations, Section 301. 7602–1(c)).

fraudulent, or contains any undervaluation or understatement,

(4) *Refusal to permit examination of books.*—Whenever any person who is required to deliver a monthly or other return of objects subject to tax refuses to allow any regularly authorized Government officer to examine his books.

(c) *Persons liable.* Such summons may be issued to—

(1) *Persons mentioned in subsection (b).* Any person mentioned in subsection (b), or

(2) *Persons having books.* Any other person having possession, custody, or care of books of account containing entries relating to the business of any person mentioned in subsection (b), or

(3) *Other persons.* Any other person the collector may deem proper.

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, c. 173, 13 Stat. 223, 226, Sec. 14,[17] and reenacted several times prior to its codification in 1939.[18]

[17] There were no committee reports on the 1864 Act.

[18] Act of July 13, 1866, c. 184, 14 Stat. 98, 101, Sec. 9; Act of December 24, 1872, c. 13, 17 Stat. 401, Sec. 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, c. 125, 20 Stat. 327, 330–331, Sec. 3; Act of August 27, 1894, c. 349, 28 Stat. 509, 557–559, Sec. 34; Act of October 3, 1913, c. 16, 38 Stat. 114, 177–179, Subsec. I; Act of September 8, 1916, c. 463, 39 Stat. 756, 773–774, Sec. 16; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1146–1147, Sec. 1317; Act of November 23, 1921, c. 136, 42 Stat. 227, 311–312, Sec. 1311; Act of June 2, 1924, c. 234, 43 Stat. 253, 344–346, Sec. 1018; Act of February 26, 1926, c. 27, 44 Stat. (Part 2) 9, 117–118, Sec. 1115.

Finally, and of particular pertinence here, the third part of the "existing law" carried forward in Section 7602 of the 1954 Code is derived from Section 3654(a) of the 1939 Code, which provided as follows:

> SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.
>
> (a) *Collectors.*—Every collector within his his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

This Section was derived from an essentially identical provision first enacted in 1868, Act of July 20, 1868, c. 186, 15 Stat. 125, 144, Sec. 49, and codified as part of Section 3163 of the Revised Statutes of 1874.[19]

[19] This statute was amended by the Act of August 15, 1876, c. 287, 19 Stat. 143, 152, pursuant to which the supervisors' functions were eliminated and their investigative powers transferred to the collectors. See n. 16, *supra*. Section 3163 of the Revised Statutes was amended by the Act of March 1, 1879, c. 125, 20 Stat. 327, 328, Sec. 2, which also imposed the duty to oversee that all laws and regulations relating to the collection of internal revenue taxes were faithfully executed upon the revenue agents as well as the collectors. Because at that time Congress did not want to extend the summons power given to

Significantly, in the 1878 congressional debates concerning whether to extend the summons power held by the collectors to the revenue agents, the power of the collectors to summon third-party records as a means of discovering the taxpayer's identity appears to have been well understood. See 7 Cong. Rec. 3920–3924. Indeed, the debate included (*id.* at p. 3922) a description of an incident in which an internal revenue summons was issued to a railroad to examine its books of account in order to determine the identity of the distiller who shipped spirits which were believed to be untaxed.

Thus, by combining Sections 3614, 3615(a)–(c), and 3654 into Section 7602 in 1954 without intending to change existing law, Congress continued to sanction the use of an internal revenue summons to discover the identity of a person who may be liable for unpaid taxes. Like Section 7602, all of these prior provisions cast the summons power in the broadest possible manner, using terms such as "any person," "any return," and "any objects or income liable to tax." Moreover, the expansive scope of Section 3654 of the 1939 Code, granting to the collectors the power to issue summonses for any purpose relating to their duty to oversee the faithful execution of internal revenue laws and to the "prevention, detection, and punishment of

collectors to the revenue agents, the reference to the summons authority was deleted from Section 3163 of the Revised Statutes. However, the collectors continued to maintain the authority to issue summonses under the Act of August 15, 1876, c. 287, 19 Stat. 143, 152, which was carried forward into Section 3654(a) of the 1939 Code. See Table B, 53 Stat. (Part 1) XLII.

any frauds," strongly supports a reading of Section 7602 as empowering the Service to discharge fully its affirmative and wide-ranging duty under Section 7601 to canvass and to inquire. Thus, the history, as well as the text of both the current provision and its authoritative predecessors tends to refute, rather than support, the distinction, made by the decision below, between a summons to ascertain the identity of a potential taxpayer and one seeking information with respect to an identified taxpayer.

C. NO VALID INTEREST WOULD BE PROTECTED BY THE HOLDING BELOW THAT "JOHN DOE" INTERNAL REVENUE SUMMONSES ARE INVALID PER SE

1. Although the court of appeals premised its decision upon the ground that Section 7602 does not authorize the issuance of a summons when no named taxpayer is under investigation, its opinion and that of the Fifth Circuit in *Humble Oil* reflect concern that such "John Doe" summonses might be used for open-ended investigations of an exploratory nature that might in some manner infringe upon interests which should be protected from governmental inquiry. Thus, the court here referred to the possibility of examination of "the financial affairs of an indefinite number of unspecified persons * * *" (Pet. App. B 15a), while the *Humble Oil* opinion condemned what it characterized as "conduct[ing] a 'fishing expedition' * * * pursuant to a research project" (488 F. 2d at 960–961).

But the types of abuses apparently feared—fishing expeditions or dragnet investigations—do not inhere in every internal revenue summons drawn in the name

of "John Doe" which seeks to discover the name of a particular person who may be liable for unpaid taxes. And this Court's decisions provide ample and specific protection against such defects as overbreadth or immateriality in any internal revenue summons.[20] For example, in *United States* v. *Powell*, 379 U.S. 48, 57–58, the Court set out four requirements for the enforcement of an internal revenue summons: (1) that the investigation be conducted pursuant to a legitimate purpose; (2) that the inquiry be relevant

[20] Indeed, the court below principally relied (Pet. App. B 16a–18a) upon decisions refusing enforcement of summonses on the ground of immateriality (*McDonough* v. *Lambert*, 94 F. 2d 838 (C.A. 1); *In re International Corporation Co.*, 5 F. Supp. 608 (S.D.N.Y.)) or overbreadth (*Local 174, Etc.* v. *United States*, 240 F. 2d 387 (C.A. 9); *First National Bank of Mobile* v. *United States*, 160 F. 2d 532 (C.A. 5)). Those decisions are irrelevant to the question of statutory authority raised here. Indeed, the court in *International Corporation Co.*, specifically recognized the validity of a "John Doe" summons, citing *Miles* v. *United Founders Corp.*, 5 Supp. 413 (D. N.J.). The latter case enforced an internal revenue summons which sought from a corporation the names of its shareholders.

Mays v. *Davis*, 7 F. Supp. 596 (W.D. Pa.), also cited by the court below (Pet. App. B 17a) and relied upon by the Fifth Circuit in *Humble Oil* (488 F. 2d at 962), is similarly inapposite. There, a summons was issued under Section 618 of the Revenue Act of 1928. That statute, which was carried forward as Section 3614 of the 1939 Code, authorized summonses solely "for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made." On the basis of this purpose clause, the court held that the statute did not authorize a summons to require a trust company to reveal the names of all of the beneficiaries of a certain type of trust. But the present summons authority reflects an amalgamation of all of the prior statutory provisions, *viz.*, Sections 3614, 3615(a)–(c), and 3654(a) of the 1939 Code. Its scope is therefore necessarily broader than that of Section 3614, upon which *Mays* rests.

to the purpose; (3) that the information sought is not already within the Commissioner's possession; and (4) that the administrative steps required by the Code have been followed. Moreover, in *Donaldson* v. *United States, supra*, 400 U.S. at 530, the Court reiterated two instances, previously specified in *Reisman, supra*, where intervention by a taxpayer in a summons enforcement proceeding is appropriate, namely, "where 'the material is sought for the improper purpose of obtaining evidence for use in criminal prosecution' or where 'it is protected by the attorney-client privilege.'"

In light of the substantial protections afforded by this Court's decisions against an overbroad or otherwise abusive internal revenue summons, no useful purpose would be served by a *per se* rejection of the validity of any and all "John Doe" summonses. The summons here, as well as that in *Humble Oil*, sought records or information described with specific particularity and was in no sense overbroad or immaterial to the subject under inquiry. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186. Indeed, the district court narrowed enforcement of the summons here to require production only of certain types of cash deposit tickets during a specified period (Pet. App. A 5a). It thus demonstrated that the enforcement process contains the necessary judicial safeguards against abuse of process, without a *per se* rule needlessly curtailing the Service's ability to pursue legitimate inquiries. See *United States* v. *Powell, supra*, 379 U.S. at 58 and n. 20.

Nor has any valid testimonial privilege been asserted here to justify respondent's refusal to comply with the summons. This Court has only recently held, in sustaining the constitutionality of the Bank Secrecy Act of 1970, that no privilege, constitutional or otherwise, protects banks from the requirements of record-keeping and production to the government of the very type of information sought by the internal revenue summons in this case. See *California Bankers Association* v. *Shultz,* No. 72–985, decided April 1, 1974. No claim of privilege against self-incrimination has been made on behalf of the bank or any of its officers, nor would such a claim be available. See *e.g., Hale* v. *Henkel,* 201 U.S. 43, 74–75; *Wilson* v. *United States,* 221 U.S. 361, 382–384; *Bellis* v. *United States,* No. 73–190, decided May 28, 1974. Similarly, while taxpayers who are presently unknown may be incriminated by the records sought by the Service in these cases, the production of such third-party records involves no violation of their Fifth Amendment rights. See *Couch* v. *United States, supra,* 409 U.S. at 328; *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas J., concurring).

Finally, respondent's Fourth Amendment claim, which the court of appeals did not find it necessary to reach, is insubstantial in light of the district court's narrowing of the enforcement order. It has long been settled that a reasonable internal revenue summons served upon a third-party bank does not violate the Fourth Amendment rights of either the bank or any person who might be subject to investigation. *First National Bank of Mobile* v. *United States,* 267 U.S. 576, affirming, 295 Fed.

142, 143 (S.D. Ala.); *Donaldson* v. *United States, supra,* 400 U.S. at 522.

2. Except for the decision below and *Humble Oil,* the foregoing considerations have led four courts of appeals to uphold enforcement of the type of summons issued in this case. See *Tillotson* v. *Boughner,* 333 F. 2d 515 (C.A. 7), certiorari denied, 379 U.S. 913; *United States* v. *Theodore,* 479 F. 2d 749 (C.A. 4); *United States* v. *Turner,* 480 F. 2d 272 (C.A. 7); *United States* v. *Berkowitz,* 488 F. 2d 1235 (C.A. 3), petition for a writ of certiorari pending, No. 73–1175; *United States* v. *Carter,* 489 F. 2d 413 (C.A. 5). See also *United States* v. *Clayton & Co.* (S.D. Miss.), decided May 10, 1973, 73–1 U.S.T.C. par. 9452.

Tillotson involved a summons requesting a lawyer to testify concerning the identity of the client or clients on whose behalf he had made an anonymous payment to the Internal Revenue Service. In upholding enforcement of the summons, the Seventh Circuit expressly rejected the argument, upon which the decision below is grounded, "that only an investigation of a taxpayer whose identity is known is authorized" (333 F. 2d at 516). The court below purported to distinguish *Tillotson* on the ground that the summons in that case was issued to assist in determining a specific taxpayer's liability whereas the summons here requests "examination of bank records pertaining to the affairs of a class of persons when no particular, specific taxpayer was under investigation" (Pet. App. B 22a). But in both *Tillotson* and in this case, the identity of the person subject to investigation was unknown; and the person whose identity is

being sought here—the transferor of the one hundred dollar bills—is no less "specific" than the unidentified client in *Tillotson*. The court's distinction of *Tillotson* is thus factually unpersuasive and cannot in any event be squared with its broad declaration that Section 7602 "presupposes that the IRS has already identified the person in whom it is interested" (Pet. App. B 15a).

The other "John Doe" summons cases involve enforcement of summonses issued to tax preparers seeking the identities of, and other information concerning, the preparer's clients. See, *e.g.*, *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Berkowitz*, 488 F. 2d 1235 (C.A. 3), petition for a writ of certiorari pending, No. 73-1175;[21] *United States* v. *Carter*, 489 F. 2d 413 (C.A. 5). The court below made no attempt to distinguish this line of cases.[22] Although these cases and *Tillotson* arose in different contexts, like *Tillotson* they stand for the

[21] In upholding enforcement of a summons seeking a tax preparer's customer list, the Third Circuit in *Berkowitz* suggested that there was an "obvious distinction" between the present case and a summons issued to a tax preparer. It stated that whereas in this case the information was "not otherwise in the control of the Internal Revenue * * * the request here * * * is to secure enough facts so that the Commissioner may locate data [*viz.*, the returns filed by the preparer's customers] which he now possesses" (488 F. 2d at 1236). This distinction, however, overlooks the fact that internal revenue summonses are commonly used to obtain information which is not otherwise available to the Service.

[22] The court discussed only *Theodore*, which it apparently read as refusing to enforce a "John Doe" summons (see Pet. App. B 19a–20a). While the Court in *Theodore* concluded that the scope of the summons was too broad, it further held that the Service was entitled to production of a list of the preparer's clients' names and Social Security numbers (479 F. 2d at 755).

general principle, which we urge here, that the Internal Revenue Service has the statutory authority to issue a summons in order to discover the identity of a person who may be liable for unpaid taxes.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, Et Al. - Petitioners

versus

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky - - - - - - - Respondent

---

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1245

UNITED STATES OF AMERICA, Et Al. - *Petitioners*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky - - - - - *Respondent*

ON WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

ISSUES PRESENTED FOR REVIEW

There are two questions presented for review and they are as follows:

I. Whether a Special Agent of the Internal Revenue Service has the authority under Sections 7602 and 7601 of the Internal Revenue Code of 1954 to issue a "John Doe" summons against a bank which required the bank to produce records pertaining to a designated class of transactions which the bank *may* have had with its customers, when the Special Agent admits that the "taxpayer" named in the "John Doe"

summons is both an unknown person and fictitious and that no person or persons is under investigation.

II. Whether the Section 7602 summons the trial court ordered to be enforced constituted an unreasonable search or seizure under the Fourth Amendment.

STATEMENT OF THE CASE

It is important to keep in mind a few facts that are basic to a determination of the issue here. Petitioner does not contend that any depositor of Commercial Bank, respondent's employer, has failed to make a correct federal income tax return, or failed to make a return at all, or that any depositor has failed to pay a tax liability. The special agent who issued the summons here proceeds upon curiosity—curiosity predicated upon a suspicion based upon an inference, founded, in turn, upon still another inference, thus: old and badly worn money was submitted to a federal reserve bank, and this kind of money could have achieved its condition through storage (the first inference) (App. 20), and because people sometimes store money secretly upon which the tax has not been paid (the second inference), then maybe this money was brought to the bank by a depositor who had kept it for a long time in a secret place rather than put it in a bank where it could be found or traced and his tax delinquency ascertained (the suspicion). Without attacking the soundness of the syllogism (which would seem to be defeated by the fact that the money was put

in circulation, presumably by someone not afraid to do so), it is apparent that Special Agent Brutscher is attempting to use Section 7602 as the imprimatur for unlimited access to confidential bank records.

Also, we use the term "depositor" here as distinguished from the term "customer" because a customer could be anyone who does business in the bank, including anyone walking in off the street to exchange old money for new, and no record would be made of a cash exchange type of transaction, save only in the mind of the teller who received the cash (App. 37). A "depositor," on the other hand, would be a customer who makes deposits and thereby leaves a record of his transactions. Special Agent Brutscher wants to invade the records of "depositors" for a limited purpose, he says, but yet really without limitation. The type of cash at issue here could, of course, lie in a bank vault indefinitely insofar as the evidence here shows. Neither the chief teller nor any of the individual tellers who might know the identity of a "customer" who brought such a sum of money to the bank was subpoenaed as a witness. Bisceglia is a bank officer, not a teller (App. 35).

The evil of the summons here, as viewed by Bisceglia (even as it was modified by the District Court) is that it expands the Section 7602 power of a special agent to such an extent that there is no limit to the use of the summons—except the whim of the revenue agent who issues the writ.

It is also significant that the petitioner did not, when this matter was before the District Court, predicate the issuance of the summons here upon Section 7601 of the

Code. Only when the case was briefed for the U. S. Court of Appeals for the Sixth Circiut did petitioner develop the argument that the canvassing statute legitimized his use of a John Doe summons.

ARGUMENT

I. The Summons as Drawn Is Unenforceable Because It Is Directed to an Individual Bank Employee Who Has Testified Without Contradiction That He Does Not Know How the Currency in Question Came to the Bank.

One aspect of this case seems largely to have been ignored by the parties and the lower Courts in the briefs and opinions rendered previously in this litigation, although certainly the facts are undisputed. The summons directed to Bisceglia (not the bank) calls for him to disclose those bank records "which will provide information as to the person(s) or firm(s) which deposited, redeemed (sic), or otherwise gave to Commercial Bank . . ." (App. 8, 9). The summons, therefore, not only commands the production of bank records but specifically those records which will, in effect, *identify* the bank customer who brought the old money to the bank. Records, of course, are mute, inorganic objects. They reflect what someone puts on them. The testimony here does not show that customers' deposit tickets would reflect anything more than the name, address, and date of the deposit, and whether it involved currency, checks, or coin, the usual information. Presumably, a deposit ticket would not have a notation on the margin that the currency was old, thin, or brittle, the conditions which aroused the interest of the em-

ployee of the Federal Reserve Bank at Cincinnati, Ohio, who brought this matter to the attention of the IRS. The evidence shows that Bisceglia is a loan officer, not a teller (App. 35). He testified without contradiction that he knew nothing of this affair until he heard it discussed generally in the Bank (App. 42). He said he did not know the origin of the money (App. 36). If others did, they were not made parties to this proceeding, summoned by the IRS, or subpoenaed as witnesses in the District Court. No record would exist to identify the patron who made a cash exchange (App. 37).

Hence, the summons as drafted, in view of the evidence, is unenforceable because it requires *personal* judgment, a determination by a single bank employee which he says he cannot make—the *identity* of the person or persons who made a deposit or an exchange of certain currency, *specific* currency. Even if all bank records, including deposit tickets, were produced, the evidence does not show that Bisceglia could make the identification desired by the IRS. The summons may say "provide information", but it means to identify the responsible customer or else to point the finger of suspicion at all customers in a possibly broad class. The burden of proof is on the United States of America to show that Bisceglia could, through his own knowledge, or using the records, provide the information. Failing to do this, can petitioner ask this Court to order Bisceglia to make a judgment that is nothing more than speculative? Can it order him to breach, on a wholesale basis, its confidential relationship with an entire

class of customer? In *California Banker's Assn.* v. *Schultz,* No. 72-985, decided April 1, 1974, the Court, while recognizing that incorporated associations cannot plead an unqualified right to conduct their affairs in secret, did say that they should have protection from unlawful demands made in the name of public investigation, citing *Federal Trade Comm'n.* v. *American Tobacco Co.,* 264 U. S. 298, 68 L. Ed. 696.

There may be many deposits during the period in question which consist of currency in the amount of $20,000 or in $100 denominations exceeding $5,000, the basis of the order to comply fashioned by the District Court. On the evidence, then, shall Bisceglia disclose them all? If he complies with the District Court's order, he can do no less. Does he have the right to do this? Does the IRS have the right to make him do it? If this can be done, the confidentiality of bank records is a nullity. More importantly, the evidence produced by petitioner itself defeats any notion that Bisceglia can "provide the information" required by the summons here. He can only surmise, and open a Pandora's box of federal inquisition into depositors' affairs.

II. Neither Section 7601 Nor 7602 Constitutes Specific Statutory Authority for the IRS to Secure a Summons for Information Pertaining to a Yet Undefined, Possibility Illusory Class of Persons Whose Potential Tax Liability Is Merely Based Upon a Figment of a Special Agent's Yet Unsubstantiated Imagination.

The argument of petitioner here is, in essence, that there really is no limitation upon the authority of a revenue agent to obtain records through the use of the summons authorized by Section 7602 of the Code. If, as petitioner argues, Section 7601 of the Code is a sweeping authorization for canvassing every citizen of the United States as to his tax liability and Section 7602 is merely the instrumentality to be used in effecting the canvassing activities prescribed by the preceding section, then the first paragraph of Section 7602 could have been eliminated. In other words, instead of beginning Section 7602 with the words "for the purpose of ascertaining the correctness of any return, making a return when none has been made, determining the liability of any person for any revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized"—the Congress *could* simply have said that for the purpose of implementing the authority granted under 7601 the Secreary is authorized to . . ., and then rectie the power set up in Subparagraphs (1), (2), and (3) of Section 7602; but, the Congress did not do this. Instead Congress listed several specific grounds upon which the Secretary could exercise the authority vested by Section 7602. This would seem to rebut the attempt now by the

Secretary to use the canvassing statute as a basis for his argument that the use of the summons is without any limitation outside his own discretion. The lower Court felt this was the proper interpretation, and the Fifth Circuit also arrived at the conclusion that Section 7601 was merely a general admonition to the Secretary as to his general duties and not a specific authorization of power to be read into Section 7602. *United States* v. *Humble Oil and Refining Co.*, 488 F. 2d 953, 960 (5th Cir. 1974), petition for certiorari pending, No. 73-1827.

This is the only reasonable interpretation to put upon Section 7602 for, otherwise, the potential for abuse inherent in the Secretary's argument is rather terrible to consider. Under the interpretation for which petitioner now argues it would not make any difference whether we were talking about a case involving old and deteriorated bills which may have been stored and for which no tax might have been paid. We could be talking about any type of record which a revenue agent's curiosity might impel him to explore, whether or not it be for a lawful congressional purpose —he can demand anything because he is canvassing the territory. We have to believe that there are few members of the Congress who have such an abiding faith in human nature that they would cloak any other mortal with such invincible authority. Indeed, we would question whether the Congress could make such a grant of power if it chose to do so. Under such circumstances, the members of the legislative branch would be saying to the Secretary and his agents: "You go anywhere, do anything, invade any transaction, secure the most private records, and you alone are the judge of your

actions." To state the proposition condemns it. If phrased in that type of language, the congressional grant of authority would violate all of the due process requirements of our constitutional system and would be without cavil an invasion of privacy and an unreasonable search and seizure if exercised. It was for this reason, surely, that the Congress, in drafting Section 7602, established very specific grounds upon which the summons authority could be used, and we think it is quite implicit in those grounds that there must be a known taxpayer involved before such a writ issues; for, if no particular taxpayer need be established (this case aside) and we assume in the Secretary an unlimited authority, then, by definition, such power is an unreasonable power, and contrary to all the presumed and lawful intentions of the legislative branch.

The petitioner has cited a great deal of authority in support of his argument here; but virtually all of the cases upon which he relies, fall into the tax preparer category in which the Secretary has been investigating people who prepare tax returns for hire and who have been found to prepare returns improperly. All of these cases may be distinguished from the case at hand in that in those cases there were known taxpayers whose returns had been filed by the tax preparer under investigation, and the identity of the taxpayer was already known to the Commissioner through the returns themselves. It was simply convenient there to get the identity of the taxpayers directly from the preparer of the return and thereby expedite what would, otherwise, be a tedious job of going through

IRS records to come up with the same data. Indeed, in *United States* v. *Berkowitz,* 488 F. 2d 1235 (3rd Cir. 1973), petition for certiorari pending, No. 73-1175, the Third Circiut itself distinguished the case from this case on that basis. The Third Circuit said also in *Berkowitz,* in distinguishing that case from this one:

> ". . . Furthermore, since the regulations require that a return prepared by a commercial tax preparer be identified as such, the data which the forms seeks is required by law in any event."

Another obvious distinction between the situation here and that type of case is that in investigating tax preparer firms the inquiry was based on *concrete* preliminary investigation which had *established* misconduct on the part of the accounting firm. There was an unequivocal basis to believe there that the tax preparer had complied income tax returns improperly and denied the government a tax due. It did not involve delving generally into the records of uninvolved taxpayers on the suspicion or chance that someone, ultimately, might be found to have evaded income tax. Indeed, in those cases, the Commissioner had gone so far as to establish *probable cause* to believe the tax preparer firm had erred in its work on other occasions by sending a revenue agent in with certain data to have a tax return prepared using same and having determined in this way that the firm which did the work had made substantial errors in compiling the return to the detriment of the public treasury. And even in the Fourth Circuit, in *United States* v. *Theodore,* 479 F. 2d 749 (1973) at page 755, the Court held Section

7602 *"only allows IRS to summon information relating to the correctness of a particular return or to a particular person and does not authorize the use of open-ended Joe Doe summonses."* (Emphasis Ours)

In those cases other than the tax preparer type of case where the Court has sustained the summons directed at determining the identity of the taxpayer, the facts will show that it was known that there was a taxpayer in existence, as in *Tillotson* v. *Boughner,* 333 F. 2d 515 (7 Cir., 1965), certiorari denied, 379 U. S. 913, where an attorney had delivered a check to the Secretary to cover taxes of the individual taxpayer thus precipitating an investigation as to the further tax liability of a known taxpayer who simply had not been identified by name.[1]

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[1]The Court in *Humble* directly disapproved the dicta in *Tillotson* v. *Boughner,* 333 F. 2d 515 (7 Cir. 1965), which dismissed objections to the "john doe" summons in remarking that Section 7601(a) authorized the Internal Revenue Service to "investigate" taxpayers, and that Section 7602 was designed to implement Section 7601(a), the government's argument before this Court. In *Humble* the Court said the more compelling view was the contrary position expressed in *Biscelgia.* In footnote 2 of Judge Blumenfeld's opinion in *United States* v. *Armour, infra,* he also distinguished and limited the holding in *Tillotson,* when he said: ". . . [T]he court's focus (in *Tillotson*) was on the fact that the Service was investigating an actual person or persons who had admitted owing substantial back taxes, and *not an undefined, possibly illusory class of persons whose potential tax liability was merely a figment of the Service's as yet unsubstantiated imagination* (in *Bisceglia*)." [Emphasis and additions supplied.] The petitioner in the case at bar would overlook and soft-pedal the fact that maybe more than one person or taxpayer was involved in the subject transactions. Since there is no evidence as to how many taxpayers or persons were connected with the transaction, the relevancy requirements of *United States* v. *Powell,* 379 U. S. 484 (1964) are thrown out the window. Thus, the information requested must necessarily relate to a class or group as yet unidentified. Judge Blumenfeld was obviously correct in saying the subject case was a fishing expedition if there ever was one. See, *infra.*

In *United States* v. *Armour,* 74-1 U.S.T.C. ¶9479 (D-Conn.), cited by petitioner in footnote 9 in its brief, the facts again are distinguishable from those in this case since there, having reversed itself on a tax ruling, the IRS wanted to know the identity of shareholders of a corporation who had been granted and then denied certain tax benefits resulting from a stock transaction. The IRS knew at the time it made its ruling that there were shareholders who would be affected by it, and only their names were unknown; but determining the *precise* identity of the stockholders was basically a ministerial act. Certainly, it did not encompass the broad exercise of authority which petitioner seeks here.

Indeed, the District Court judge said in that case,

> ". . . As far as can be judged from the opinion of the Court of Appeals (in *Bisceglia*), this was a fishing expedition if ever there was one, not only because the IRS had no idea of the identity of the depositor(s) but also because the IRS lacked any knowledge of the sort of tax liability which the depositor(s) might possibly have incurred, and could not even indicate with any specificity the particular records it wished to produce." (Additions added)

So, rather than constitute an authority for the government's position here, the District Court, in *Armour,* made a clear and rather emphatic distinction between the situation in that case and the facts here, and the case does not stand as authority for the proposition urged by the United States in this proceeding.

The District Court, in *Armour,* did not say that all John Doe summonses are invalid if the taxpayers involved are *identifiable,* as in *Armour,* on the basis of common characteristics such as owning shares of stock in a specific corporation on a specific day—and this identifying characteristic was set forth on the face of the summons. We do not argue with that distinction, and it is essentially the same distinction that the various Courts of Appeal have made in the tax preparer type of case.

As far as counsel knows, only two circuits have confronted the precise issue which is now before this Court, the Sixth Circuit in this case and the Fifth Circuit in *Humble Oil & Refining Co., supra,* although the Third Circuit in *Berkowitz, supra,* could be deemed to agree since that Court did not quarrel with the Sixth Circuit while distinguishing its case on the facts. Other authority exists where Courts have denounced overbroad summons—*United States* v. *Giordano,* 419 F. 2d 564 (5th Cir., 1969) certiorari denied, 397 U. S. 1037, and *First National Bank of Mobile* v. *United States,* 160 F. 2d 532 (5th Cir., 1947), even though the Secretary, no doubt, thought there, as here, that all the records would tell him something. But, if an overbroad request for records must fail, then certainly a request for *all* the records of a certain class of the bank's depositors would also succumb to that rule.

The Sixth Circuit also noted *Mays* v. *Davis,* 7 F. Supp. 596 (WD-Pa. 1934) decided under the predecessor section of 7602 where exploratory "suspicion" use of the summons power was forbidden.

In each other case, on different fact situations, the appellate Courts decided that Congress did not intend that the Secretary could take a summons and go about examining records (and through these records to identify a taxpayer or taxpayers) where no taxpayer was under investigation or known to have done anything wrong but simply in the hope or prospect of finding something that could incriminate someone and/or satisfy the curiosity of the agent conducting the investigation. Petitioner says this is bad law and would severely hamper the exercise of the dealings of the Secretary's office if these cases are not overturned and the sweeping authority sought is not granted. Petitioner has the problem, obviously, of attempting to rewrite the enabling statute (Section 7602) by interpretation (or asking this Court to do so) when confronted with the reality that a literate and, no doubt, perceptive Congress did not frame the statute in language suggesting such a purpose.[2]

The petitioner has indulged in his brief in a rather lengthy recitation of the history of the present Code section, but to state the matter very succinctly, we do not see anything in the language cited from any of the preceding section or administrative hearings which

[2]A little different twist was presented in *United States* v. *Matras*, 487 F. 2d 1271 (8 Cir. 1973), wherein the Court held the government had failed to sustain its burden of proof in showing that the taxpayer's company-wide budgets were relevant to the Service's audit of the company's consolidated returns after applying the relevancy tests set forth in *United States* v. *Powell*, 379 U.S. 484 (1964). In deciding against the government, the Court said that "relevant" connotes and encompasses more than "convenience." Therefore, the Court refused to permit the government to have access, under Section 7602, to the taxpayer's budgets although the agent assured the court that the budgets would provide a "road map" through the company's returns.

sustain his argument. We cited the Court in our reply to the petition for a writ of certiorari some pertinent language from hearings conducted by the Congress which, in fact, tend to rebut the petitioner's argument and to show, we think conclusively, that the Congress clearly did not intend to grant the authority sought here. We will quote here again certain language of the Assistant Secretary of the Treasury from testimony given in June, 1970, before the Committee on Financial Institutions of the Senate Banking and Currency Committee held with respect to H. R. 15073 and S. 3678 which led to the passage of the Bank Secrecy Act now encoded at 12 USC, Section 1829 (b) and 31 USC, Sections 1051-1122.

In light of this testimony, the respondent is unable to perceive the position the government is now attempting to thrust upon this Court. As a practical matter we see no difference between the situation before this Court as characterized by the Sixth Circuit and the testimony of the Assistant Secretary before the committee of Congress.[3] To illustrate, we quote the language of each. In its opinion, the Sixth Circuit said of the summons the district court ordered enforced:

> ". . . Instead, the IRS has been granted a summons enabling it to inquire into the financial affairs of a group of unspecified persons in the hope of identifying one or more of them as the person or persons who transferred deteriorated bills to the Commercial Bank, a purpose not authorized by section 7602 of the Internal Revenue Code."

[3]Quotation References are to Hearings on S. 3678 before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 91st Cong., 2d Sess., at page 147, *et seq.* (1970).

And, the Assistant Secretary said [p. 173]:

> "If the Internal Revenue Service could survey the foregoing records of international transactions, either by examining them on the premises of the bank or other financial institutions or by requiring information returns as to some of the contents of the records, the usefulness of the records in providing initial leads to cases of possible tax evasion would be enhanced. *Such surveys, however, would extend the utilization of the records beyond their traditional role as a source of information and evidence in an examination of a particular taxpayer.*"

The information requested in the case at bar as enforced by the trial Court is no different from the general surveys the Assistant Secretary was describing in his testimony before the committee. Mc eover, the Assistant Secretary told Congress that the Internal Revenue Service has not generally asserted such survey authority, the scope of which has not been reviewed by the courts (pp. 173-174).

The sum and substance of our position here is that there is no difference between a summons enabling the IRS to inquire into the financial affairs of a group of unspecified persons and a general survey authorization of a third parties financial records.

This argument is even more forceful when considered in light of the Assistant Secretary's refusal to support legislation which would have granted that general survey authority to the IRS. Such decision was made solely upon the basis that it would amount to an

unnecessary incursion against a citizen's right of privacy and possibly amount to an unreasonable search and seizure under the Fourth Amendment (P. 174). In particular, the prepared statement of the Department of Treasury, said [p. 174]:

> ". . . While it is clear that obtaining records by established discovery procedures from the banks and other institutions in connection with the examination of a *particular taxpayer would not violate these rights, provisions for a survey of such records raises a much more serious question.* * * * . . . For the same reasons that we have concluded that we cannot support new legislative authority for the survey of records not tied to a particular taxpayer investigation, we believe it inappropriate to support legislation requiring reports of information obtained from the records of international transactions" [Emphasis Supplied].

It is clear that the official Treasury Department policy has changed since June of 1970, and that the only statutory authority justifying the petitioner's position before this Court is section 7601(a), the general canvassing statute, and the one issue the government did not raise, plead, or allege in the trial court below.

Since the government specifically refused to sanction the general survey authority provided for in Sections 242 and 241 of S 3678 and H. R. 15073 of the Bank Secrecy Act, we believe this Court should refuse to entertain any contrary position in this proceeding which would give judicial approval for the survey of the financial affairs of a group of yet un-

specified and illusory persons whose potential tax liability is merely a figment of the Service's as yet unsubstantiated imagination. The government's citation of the *Armour* case constitutes ample authority for this contention.

III. The Fourth Amendment Requires That a Summons to Produce Records Under Section 7602 of the Internal Revenue Code Particularly Describe the Records Summoned and That Those Records Be Relevant to the Tax Liability of Particular Persons Under Investigation. A Summons Which Requires a Third-Party Bank to Produce All Deposit Tickets of Every Person in a Broadly Defined Class of Depositors Merely to Ascertain the Identity of All persons in That Class Does Not Meet These Requirements and Cannot Be Enforced.

In *Theodore, supra,* the Fourth Circuit defined and reviewed the Fourth Amendment prohibition against unreasonable searches and seizures. In that proceeding, the particular summons was deemed to be unprecedented in its breadth, in that the Service was attempting to secure copies of all of the returns for Theodore's clients for the years 1969, 1970, and 1971 in addition to all records, memos, workpapers which pertained to those returns. The undisputed facts in the record showed that this would require the taxpayer to produce some 1,500 returns with accompanying documentation.

After reviewing the authorities, the Court in *Theodore* said [479 F. 2d 754]:

> "A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought. United States v. Harrington, 388 F. 2d 520 (2 Cir., 1968). The government cannot go on a 'fishing expedition' through appellants' records (citing cases), and where it appears that the purpose of the summons is a 'rambling exploration' of a third party's files, it will not be enforced (Citing case). Indeed, we agree with Judge Lumbard that '[t]his judicial protection against the sweeping or irrelevant order is *particularly appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealings with the person under investigation. United States* v. *Harrington, supra* [Emphasis Added].

It is not surprising that the Fourth Circuit held held the summons was overbroad and disproportionate to the ends sought. In fact, the Court noted in its opinion that the Internal Revenue Service is not to be given the unrestricted license to rummage through the office files of an accountant in the hope of perchance discovering information that would result in increased tax liabilities for some as yet unidentified client. Moreover, the Court specifically concluded that a section 7602 summons was not meant to give the IRS such *investigative* and *inquisitorial* power.

The critical portion of the Court's opinion on *Theodore* was that the particular summons was overbroad and disproportionate to the ends sought, in that a section 7602 summons only allows the Service to ac-

quire information pertaining to the correctness of a particular return, or to a particular person, and does not authorize the use of an open-ended John Doe summons to acquire copies of returns. The controversy arose in *Theodore* as a result of the Service's nationwide tax preparer's project. An undercover agent visited the accounting firm posing as a client. The accounting firm prepared an incorrect tax refund claim. An investigation ensued. The facts and circumstances surrounding the issuance of the 7602 summons there is, and was, a world apart from the facts and circumstances surrounding the issuance of the summons in the case at bar. The summons in *Theodore* was issued because an incorrect claim for refund had been prepared by the firm on the information furnished by the government's undercover agent. Here, the summons was issued merely because of the "heady fantasy" of the IRS in seeking to find out whether or not there might have been some merely possible tax liability attaching to the deposit of $40,000 in aged currency (*Armour, supra,* at 84,255).

There are many other cases which discuss the Fourth Amendment prohibition against unreasonable searches and seizures. The "relevancy" requirement is discussed at length in *Venn* v. *United States,* 400 F. 2d 207 (5 Cir., 1968) and adopts approvingly the "relevancy" standard of *Harrington.* The "particularity" requirements of the Fourth Amendment standards is discussed in *Hubner* v. *Tucker,* 245 F. 2d 35 (9 Cir., 1957). The lesson contained in all of these cases clearly shows that to summon a bank to produce *all* deposit

tickets of *every* depositor who may have made certain types of deposits over a specified period of time hardly meets the "particularity" demand of the Fourth Amendment in that each document required to be produced must be identified with at least enough detail to enable a Court to determine whether or not it is relevant to the tax liability of a specific taxpayer, or whether such information pertains to the specific taxable transaction. Such is true in the case at bar because the Service may not constitutionally investigate an undefined, possibly illusory, class of persons whose potential tax liability was merely a figment of the Service's as yet unsubstantiated imagination.

We note that in the Sixth Circuit's opinion below and in the opinion of the Fifth Circuit in *Humble,* the Third Circuit in *Berkowitz,* and the Fourth Circuit in *Theodore,* the judges adhered generally to explanation of their opinions in terms of logical interpretation of the words of the statute; and, indeed, this type of issue is not, as the Fifth Circuit pointed out in *Humble,* a "scope of the summons" case but a "statutory authority issue," and so it is entirely proper to pick precisely over the language of the statute and the administrative notes and history of same in trying to decide what it means, and what the legislative branch intended when it wrote these particular words. But we sense, and we think perhaps the Court will sense, in reading all of these opinions variously arriving at the same conclusion, i.e., that in the absence of a particular known taxpayer, even though his identity may be unknown, there can be no use of the summons to discover

a possible taxpayer, we think there is the ineffable presence of a sense on the part of these Courts of a constitutional danger which is inherent in any grant of arbitrary power. Neither the Court below, nor the Fifth Circuit in *Humble,* reached the constitutional issue, although it was raised in this case and in Humble in the District Court and at the appeals level. Because of the issue of statutory construction, the Courts adhered to the meanings of words and did not express, we believe, something which may have been on their minds in the constitutional realm. Perhaps we divine that which does not exist, or perhaps the constitutional issues were simply too philosophical and the Courts declined to reach out for them.

We cannot say, but we do not agree, that the constitutional issue is an insubstantial one as petitioner argues on page 36 of his brief because the District Court narrowed the enforcement order. The narrowing of the original summons only touched the reasonableness issue in terms of the volume of material that the bank should produce. It did not reach the reasonableness issue in terms of determining whether a John Doe summons, absent the investigation of any known taxpayer or even the existence of a culpable class of taxpayer, is reasonable within the meaning of the Fourth Amendment to the Constitution of the United States. That issue remains, and it will remain, if this Court does not reach it here. We noticed in our first argument that this Court, in *California Bankers Assn.* v. *Schultz, Supra,* recognized that corporations should

have protection from unlawful demands made in the name of public investigation. Is there a limit beyond which the privacy of a citizen in transacting business with his bank cannot be explored by a curious government agent? We think there must be, and we think the fact that there is such a limit is clearly stated in that authority, but now it must be defined and applied to the circumstances of the case at bar.

CONCLUSION

The respondent contends that the summons issued by Special Agents Brutscher was not issued pursuant to the statutory authority of Section 7602 of Title 26, U. S. Code, because it was in the nature of a John Doe summons seeking a blanket disclosure of confidential bank records compiled in transactions which had occurred between the bank and its depositors over a substantial period of time, without establishing any relevancy between the record sought and the possible tax liability of any citizen. Indeed, there was no investigation underway concerning any taxpayer, or any class of taxpayer. The purpose of the summons was in the nature of the broadest type of exploratory inquiry designed to satisfy the curiosity of the revenue officer and unrelated to any official investigation. In addition to exceeding the clear legislative intent by using the summons in this way, and therefore exceeding the statutory authority granted in Section 7602, the use of the summons as drawn under these circumstances would

clearly constitute an overbroad exercise of the summons authority and would violate the constitutional protection afforded by the Fourth Amendment to the Constitution of the United States. While the latter issue is not determined below, nor in *Humble,* the issue was raised and has been presented here by the government, and we think it is another valid basis for affirming the decision of the Sixth Circuit.

We argued in this brief, and we reiterated here, that summons as drawn is unenforceable because it directed a particular bank employee to provide information that would identify the person or persons who brought this money to the bank either as a deposit or exchange in currency or otherwise. The evidence shows that the particular employee, respondent in this case, testified without contradiction that he knew nothing about the transaction, and it is clear that the only thing he could do would be to produce records of the bank pertaining to a broad class of depositors and present these to the special agent which, in turn, would subject all persons in the class to the scrutiny of the IRS and, no doubt, an audit of their tax affairs. This demonstrates, again, the overboard nature of the summons in the constitutional sense and it also demonstrates the invasion of the bank's confidential relationship with its depositors. There is no relationship between the broad scope of this summons and the *possible, ultimate* particular investigation that may, sometime in the future, be launched. This, again, demonstrates the fact that petitioner here argues for, in essence, an abolition of any restraints

upon his power to use the summons authority to invade the private lives of citizens. The Court should affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 73-1245

UNITED STATES OF AMERICA, *Petitioner*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky, *Respondent*

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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Section 7602 .....1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20
Section 7604(a) 2
Section 7801(a) 19
Section 7802 19

RULINGS:

Internal Revenue Service Rev. Proc. 55-6, 1955-2 Cum. Bull. 903 5

IN THE

Supreme Court of the United States

No. 73-1245

UNITED STATES OF AMERICA, *Petitioner*

v.

RICHARD V. BISCEGLIA, as Vice President of the Commercial Bank of Middlesboro, Kentucky, *Respondent*

On Writ of Certiorari from the Judgment of the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. Whether the "no name" summons issued to the bank was invalid and beyond the authority granted to the Internal Revenue Service in Section 7602 of the Internal Revenue Code of 1954.

2. Whether the "no name" summons issued to the bank constituted an unreasonable search in violation of the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On April 22, 1971, B. L. Brutscher, Special Agent for the Internal Revenue Service, caused a summons to be served on Richard V. Bisceglia as Vice President of the Commercial Bank of Middlesboro, Kentucky, requesting him to testify and bring with him documents pertaining to the deposit of certain deteriorated $100 bills. The summons was entitled, "In connection with the tax liability of 'John Doe' ". When Mr. Bisceglia refused to comply with the summons, the Internal Revenue Service filed a petition for enforcement of the summons under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 in the United States District Court for the Eastern District of Kentucky.

The respondent bank opposed the enforcement of the summons by raising four affirmative defenses. These defenses were (1) that the summons was not authorized under Section 7602 of the Internal Revenue Code and it violated the Fourth Amendment prohibition against unreasonable searches and seizures because it did not specify a taxpayer whose tax liability was being investigated, (2) that the Section 7602 summons was improper because the Internal Revenue Service was conducting a criminal investigation, (3) that the blanket request in the summons was so broad that the bank could not reasonably comply because it could not notify every depositor who transacted business with the bank during the period specified in the summons, and (4) that the Internal Revenue Service did not issue the summons in good faith. The District Court rejected each of these arguments, and in a Memorandum Opinion issued June 1, 1972, the Court authorized enforcement of the summons. That opinion is unofficially reported at 72-1 U.S.T.C. Par. 9474. The Court's order

modified the summons and required the bank to produce copies of all deposit tickets showing the identity of every depositor who made a cash deposit of $20,000 or more from October 16, 1970 to November 16, 1970, and all deposit tickets of every depositor who made a deposit during that period of $5,000 or more which involved $100 bills. The bank sought and obtained a stay on the execution of the summons pending appeal of the District Court order.

The United States Court of Appeals for the Sixth Circuit reversed the lower court ruling on the ground that the summons was beyond the authority of Section 7602 because the IRS failed to specify a taxpayer whose tax liability was being investigated. The Court did not find it necessary to reach the constitutional issue raised by Bisceglia. The Court's opinion is officially reported at 486 F.2d 706 (6th Cir., 1973). From that ruling, the Government sought a writ of certiorari to this Court. This Court granted the writ of certiorari on April 15, 1974.

STATEMENT OF FACTS

On or about November 6, 1970 and November 15, 1970, the Federal Reserve Bank in Cincinnati, Ohio, received two shipments from the Commercial Bank of Middlesboro, Kentucky, each shipment containing two hundred $100 bills. The bills were in a deteriorated condition and no longer fit for circulation. The Cincinnati Branch of the Federal Reserve Bank reported the deposits to the Internal Revenue Service and stated that the deteriorated condition apparently resulted from a long period of storage. The Internal Revenue Service apparently suspected that such money may not have been properly reported for Federal income tax purposes. Accordingly, the IRS attempted

to determine the identity of the persons who transferred the funds to the bank. In the course of this investigation a summons was issued to the bank requesting Richard Bisceglia, Vice President, to testify and to bring all records concerning the person or persons who deposited, redeemed, or otherwise gave to the bank the deteriorated $100 bills. The summons was allegedly issued under the authority of Section 7602 of the Internal Revenue Code. The summons was entitled, "In the matter of the tax liability of 'John Doe' ". The Internal Revenue Service has indicated that John Doe is a fictitious name which was substituted in the form because the IRS did not know the name of the person who transferred the money to the bank. The IRS also admitted that they did not have any specific taxpayer or specific liability under investigation. Bisceglia refused to comply with the summons, and the Government commenced this action by filing a petition for enforcement in the District Court.

INTEREST OF AMICUS CURIAE

The American Bankers Association is a national trade association having approximately 14,000 commercial banks as members. These banks, operating under both state and national charters, comprise virtually the entire commercial banking system of the United States.

A keystone of all banking activity is the relationship between the bank and its customers. This relationship is established when the bank accepts a customer's money for deposit, or when the bank makes a loan to a customer, or when the bank provides any other financial service. In the course of this financial services relationship the bank participates in the private financial affairs of its customers. Traditionally, the bank has treated customers' financial affairs as

confidential matters which are not revealed to others except, of course, under compulsion of law. The issue in this case involves the fundamental question of whether a bank is required by law to provide the Internal Revenue Service with broad access to bank records to establish the identity of unknown bank customers in order to determine whether or not such customers have unsatisfied tax liabilities.

The American Bankers Association has received a large number of inquiries from its member banks in connection with the broad issue of when and how a bank must comply with a request of the Internal Revenue Service to obtain information from bank records in connection with tax investigations of bank customers. Banks have experienced considerable difficulty and misunderstanding of their legal duties in attempting to comply with these requests. The Internal Revenue Service itself sought to establish a standard form summons and standardized procedure under Rev. Proc. 55-6, 1955-2 Cum. Bull. 903, for the purpose of defining when and how the IRS may examine records of taxpayers and third parties. In spite of the issuance of Rev. Proc. 55-6, which establishes Form 2039 as the one standard form summons to be issued under Section 7602, the Internal Revenue Service is using a variety of procedures and forms not defined by the Revenue Procedure, the Code, or the Federal income tax regulations to obtain information concerning bank customers. In this connection, it is to be noted that a bank may be liable to its customer for disclosing information when such disclosure is not required by law. See *Peterson* v. *Idaho First National Bank* 84 Ida. 10, 367 P.2d 284 (1961). Thus, it is critical to banks that the IRS obtain bank records only in accordance with procedures authorized under law.

Finally, we believe that the resolution of this case will have a broad impact on the interpretation of the authority granted to the Internal Revenue Service under Section 7602 of the Internal Revenue Code of 1954. Under these circumstances, the American Bankers Association seeks the leave of this Court to present information concerning the examination of bank records by the Internal Revenue Service in connection with a tax investigation of a bank customer which we believe will be helpful to the Court in the consideration of this case.

SUMMARY OF ARGUMENT

The records of customer transactions maintained by banks have traditionally been recognized as confidential materials. In some cases, the courts have recognized a legal duty of banks to maintain the confidentiality of these records except in cases where the bank is required to release the records under compulsion of law. Banks disclose information concerning their customers' accounts only in very limited circumstances.

The circumstances under which the Internal Revenue Service may obtain records for the purpose of conducting a tax investigation have been spelled out by Congress in Section 7602 of the Internal Revenue Code. We contend that this clear and comprehensive statute establishes the complete parameters of the authority of the Internal Revenue Service with respect to these examinations. Under the clearly defined requirements established by Section 7602, the IRS cannot issue a summons unless (1) it knows the identity of the potential taxpayer it seeks to investigate or (2) it has evidence that a tax liability exists. However, in this case the IRS did not know the identity of the potential taxpayer it sought to investigate and it did not have any

evidence that there was a tax liability yet unsatisfied. Under the purposes set forth in Section 7602, where the identity of the taxpayer is unknown, the IRS should not be allowed to use such innocent facts as deposits or exchanges of $40,000 in old $100 bills as a basis for inferring that a tax liability exists in order to establish grounds for the issuance of a summons for a broad examination of bank records. We maintain that the IRS was engaging in a fishing expedition in the hope of finding a tax liability.

The Fourth Amendment to the Constitution protects individuals against unreasonable searches and seizures. It has long been established that the test of unreasonableness is predicated upon two basic requirements, i.e., the records or other materials sought to be obtained must be relevant to the investigation, and such records or materials must be described with sufficient particularity so as not to constitute an unreasonable burden. In the instant case, the Government sought to examine the records of a large number of bank customers during a thirty day period in order to determine the identity of one potential taxpayer and whether an unsatisfied tax liability existed. We maintain that the extreme breadth of the records sought to be examined to identify a single taxpayer violates the requirement of relevancy and fails to meet the requirement of sufficient particularity under the reasonableness test of the Fourth Amendment. Moreover, we urge that this investigation jeopardized the constitutional rights of a large number of bank customers and placed an unreasonable burden on the bank.

In summary, the statutory and constiutional limitations pertaining to IRS summons for records prohibit fishing expeditions where the identity of the taxpayer

is unknown to the IRS and where there is no evidence of a tax liability. Therefore, we urge that the bank properly rejected this summons and that the law requires the bank to maintain the confidentiality of these records until such time as a legally authorized summons is issued.

ARGUMENT

I.

THE "NO NAME" SUMMONS ISSUED BY THE INTERNAL REVENUE SERVICE REQUIRING THE BANK TO PRODUCE RECORDS IS INVALID AND BEYOND THE AUTHORITY GRANTED TO THE INTERNAL REVENUE SERVICE UNDER SECTION 7602 OF THE INTERNAL REVENUE CODE OF 1954

A. The Summons Is Invalid Because It Fails To Specify a Particular Taxpayer Whose Tax Liability Is Under Investigation.

The IRS summons received by the bank in this case did not indicate the name of the bank customer or customers whose tax liability was being investigated. Indeed, the Sixth Circuit emphasized that not only did the IRS not know the identity of the bank customers, but also the IRS admitted that it neither suspected nor was it investigating a particular person or taxpayer. *United States* v. *Bisceglia,* 486 F.2d 706 (6th Cir., 1973). Nonetheless, the IRS inserted the ficticious name "John Doe" on the form and sought from the bank records on some unknown bank customer or customers who deposited certain unusual $100 bills in the bank sometime during a particular four-week period. The IRS contends that a civil summons may be used to obtain certain records in spite of the fact that the IRS does not know the identity of the person or persons about whom they seek the information. We strongly contend that Section 7602 does not authorize the IRS to conduct inquiries into the private affairs of U.S. citizens and other taxpayers at random, but only allows the IRS to investigate specific persons for certain specific purposes. (Subpart B of this argument will address the purposes for which a summons may be issued.)

Previous case law authority supports the proposition that the Internal Revenue Service cannot use a summons to conduct tax investigations when the identity of the taxpayer is not known and where there is no evidence to indicate that any tax liability exists.

In *Mays* v. *Davis,* 7 F. Supp. 596 (W.D. Pa., 1934) the Internal Revenue Service sought information from a bank concerning the names of beneficiaries of a trust created by a will. In that case, the Internal Revenue Service argued that the information that they would receive from this summons would contribute in determining the correctness of certain tax returns. The bank resisted the summons, arguing that the statutory authority of the predecessor to Section 7602 did not authorize the Internal Revenue Service to seek such private information without further indication that a tax investigation was under way. The Court agreed with the bank, saying that to grant approval of this summons "would be to grant a mere explanatory search for information on the part of the petitioner and that not being within the law, that the petition should be refused". At p. 596.

Similarly, in the case of *McDonough* v. *Lambert,* 94 F.2d 838 (1st Cir., 1938), the Internal Revenue Service served a summons on a corporate treasurer for the purpose of determining certain information about the corporation's tax return. The summons also sought information concerning certain payees of corporate funds.

The Court, in that case, refused to order enforcement of the summons as it applied to information about third parties because it was the corporation's tax liability which was being investigated, and information about the third parties would not affect that tax liability. The Court said,

> We do not think the provisions of this section can be given such a broad construction; that by its terms it is more limited in scope and confined to the procurement of evidence, oral or documentary, bearing upon matters required by law to be included in a given tax return to determine the correct tax liability of the person who made the return or who failed to make one, and was not intended to authorize the procurement of evidence that might be material in verification of the tax return of some other person, not known to the Bureau of Internal Revenue, and who may or may not have a return. At p. 841.

More recently, the United States Court of Appeals for the Fifth Circuit ruled that the Internal Revenue Service cannot use its investigatory authority under Section 7602 unless a specific investigation of specific individuals has been undertaken. The Court said,

> We agree with the District Court that "[t]here must be some nexus between information sought and a specific individual before the government can compel third parties, at their own expense, to give information to the Internal Revenue Service." *United States* v. *Humble Oil & Refining Company,* 346 F. Supp. 944, 947 (S.D. Tex. 1972). Before a Section 7602 summons may issue, the IRS must have traversed the data gathering stage and initiated an investigation. See *United States* v. *Humble Oil Refining Company,* 488 F.2d 953, 960 (5th Cir., 1974).

In reviewing *Bisceglia,* the Sixth Circuit pointed out that the Internal Revenue Service may not examine and summon records in the hope of finding a person who owes a tax liability. The Court said,

> In the past, whenever the IRS has sought to use its summons power as an exploratory or identifying device to compel the production of records pertaining to a group of otherwise unidentified persons in the hope of discovering whether persons in this group may be taxpayers or, if so, may be liable for income taxes, courts have moved swiftly to arrest or curtail the attempt. *Bisceglia, supra,* p. 710-11.

The Government relies strongly on the case of *Tillotson* v. *Boughner,* 333 F.2d 515 (7th Cir., 1964) *cert. denied,* 379 U.S. 913 (1964), for the proposition that an Internal Revenue summons can be used, even though the Internal Revenue Service does not know the name of the taxpayer under investigation. In that case, an attorney had sent a check to the Internal Revenue Service with a letter explaining that the check was anonymous payment for previously underpaid taxes. The Internal Revenue Service issued a summons to the attorney for the purpose of determining the identity of this taxpayer. The lower court in this case distinguished *Tillotson* on the ground that a specific investigation of a tax liability had already begun and that, in fact, there was an admission by the taxpayer's lawyer that a tax liability existed. That situation is quite unlike this case where the Internal Revenue Service is operating on the unsupported assumption that the deteriorated $100 bills deposited in the bank had not been reported for tax purposes. It is also important to note that the Court in the *Tillotson* case was careful to distinguish the *Mays* case, so that the rule established in that earlier decision is still valid.

B. The Summons Is Invalid Because It Does Not Satisfy Any of the Four Conditions Contained in the Statute as Proper Grounds for the Issuance of Such Summons.

Section 7602 (see Appendix) provides that the Secretary or his delegate may (1) examine books and records, (2) summons persons having books and records to produce such materials and give testimony, and (3) take testimony of the taxpayer concerned, for any one of the four specific purposes. These four purposes are:

(1) Ascertaining the correctness of any return,

(2) Making a return where none has been made,

(3) Determining the liability of any person for any Internal Revenue tax, or

(4) Collecting any such liability.

We strongly contend that the summons in this case was not issued for any of the purposes listed. Indeed, after reviewing the four permissible purposes for which a summons may be used, the Sixth Circuit concluded that, "The IRS has not made the demonstration requisite for the enforcement of a summons". *Bisceglia, supra,* p. 712.

Taking the purposes set forth in the statute in order, first, for a summons to be issued for the purpose of ascertaining the correctness of any return, the IRS must have a return in their possession which they have selected for verification. In this case the IRS is not reviewing any specific tax return.

Second, and similarly, a summons cannot be issued for the purpose of compiling information to make a return where none has been made unless the IRS has established that a taxpayer has failed to file a return. There is no evidence that a taxpayer has failed to file a return in this case.

Third, it is possible that this summons has been issued for the purpose of determining the liability of any person for any IRS tax. *We contend that no summons may be issued for this purpose unless the IRS either*

(1) *knows the identity of the taxpayer being investigated, or*

(2) *has some evidence that there is a tax liability yet unsatisfied.*

In this case, neither of these alternative prerequisites are met. The IRS does not know the identity of the taxpayer being investigated, and it does not have the slightest evidence that there is any tax due to the Government for failure to report as income the $100 bills deposited or exchanged in the bank. The only information that the IRS does have is that a sum of money, in somewhat deteriorated condition, has recently been deposited in a bank. The Government in its brief (pages 16 and 17) arrives at several extraordinary conclusions, which are not supported by the facts of this case, in regard to deposits of cash, particularly when they are made in old bills. While acknowledging that there is nothing illegal in using cash as an exchange medium, the Government contends that "a large sum of cash" (in this case, only $40,000) always suggests the possibility that the owner has evaded taxes. Moreover, the Government draws unsupported inferences from the fact that the bills were of a deteriorated quality, going so far as to speculate that the bills had been hidden which further contributes to the Government's inferences of possible tax evasion. Further, the Government makes the extraordinary contention that there is "a strong suggestion that *additional taxes* might be owed

by the owner of [this] cash hoard"—a suggestion that is totally unsupported by the facts of the case.

The mere fact of a deposit or exchange of $40,000 in old bills per se does not in any way support an inference of tax evasion or any other unsatisfied tax liability. The Government through these thinly contrived inferences seeks to establish a basis for conducting a tax investigation and for determining the identity of "an unknown potential taxpayer" through the use of a summons issued in the name of "John Doe".

Thus, we urge that the assumption that there was a tax liability owing to the Government in this case is completely unfounded. There is an unlimited number of reasonable circumstances in which a person would deposit or exchange a large number of old $100 bills in a bank which have nothing to do whatever with evasion of Federal income taxes. There is no evidence in this case to refute a presumption that the circumstances surrounding these deposits were proper and legal, nor is there any evidence to establish a tax liability which should be investigated by the Internal Revenue Service.

Under the two alternative prerequisites stated above (i.e., identity of the taxpayer or some evidence of tax liability), the IRS does not have sufficient grounds for issuing a summons for the purpose of "determining the liability of any person". If this Court were to give a broader reading to this provision of the Code, the IRS would be able to investigate anyone, for any purpose, without any requirement of establishing a nexus between established facts and an existing, unsatisfied tax liability. The IRS would be able to investigate any

person engaged in any transaction which *might* not have been properly reported for income tax purposes. This kind of general authority is inconsistent with the scheme established under Section 7602 which contains four specific conditions under which the IRS is authorized to conduct investigations.

If the Court employs the two alternative prerequisites discussed above, it will find a line of consistency in the previous case law.[1] Under the above interpretation, the summonses issued in *May* v. *Davis, McDonough* v. *Lambert,* and *U.S.* v. *Humble Oil & Refining Company* would be invalid because in those cases neither the identity of the person to be investigated, nor the fact that any tax liability existed was established by the IRS. And the courts in those cases *did rule* that the summonses were invalid. Conversely, the "no name" summonses in the case of *Tillotson* v. *Boughner,* which the Court upheld, would be valid under the above cri-

[1] This two-part test would also shed some light on court decisions handed down since the Sixth Circuit decision in *Bisceglia.* In *United States* v. *Armour,* 74-1 U.S. Tax Court Par. 9479 (D. Conn. 4/25/74), it was undisputed that additional tax would be owed by many of the stockholders of the Hartford Fire Insurance Company because the IRS had reversed itself on an earlier ruling which had approved as tax-free an exchange of stock transaction involving those stockholders. In that case the Government sought to obtain the names of the stockholders from bank records. The Court in *Armour* upheld the use of the summons even though the IRS did not have the names of the stockholders because it was clear that there was a tax liability to be investigated. While we do not approve the use of "no name" summonses in any circumstance because, *inter alia,* such a device provides access to the financial records of a very large number of bank customers, we recognize, as have the Federal Courts, that in some situations such as *Armour* the IRS may actually be investigating a tax liability of a specific person and yet not have his name. In that circumstance a summons would be valid under the two alternative tests offered above. Thus there is no real conflict between the decisions in *Bisceglia* and *Armour.*

teria because even though the IRS did not know the name of the taxpayer it sought to investigate, the IRS had established that a tax liability did exist, that its payment was at least delinquent and perhaps partially unsatisfied, and that a criminal prosecution might be appropriate. These facts were established because the check sent by the taxpayer's attorney was for taxes due and payable. It is important to note that the District Court in the *Tillotson* case distinguished *McDonough* and *Mays* on this ground. The Court said,

> Moreover, these cases [*McDonough* and *Mays* and others] are factually distinguishable because in none did the Commissioner have reason to believe that unpaid taxes were owed by a taxpayer whose name he did not know, and in none did a taxpayer admit his tax liability while concealing his identity. See 225 F. Supp. 45, (N.D. Ill. 1963).

We believe that the case before this Court is similarly distinguishable from the *Tillotson* case and that, under the two-part test mentioned above, the summons was not properly issued for the purpose of "determining the tax liability of any person".

Fourth, and finally, the IRS has not contended in this case that they are collecting a tax liability. Therefore, the fourth purpose for the issuance of a summons under Section 7602 does not apply to this case.

In light of the foregoing analysis of the application of the statute to the facts of the case, it is to be concluded that the IRS summons was not issued for any one of the four specific purposes set forth in Section 7602. Therefore, we argue that the summons is invalid since it does not satisfy the conditions contained in the statute establishing proper grounds for the issuance of the summons.

C. The Summons Issued to the Bank Cannot Be Justified Under the Authority of Section 7601 of the Code.

The summons issued to the bank in this case (Form 2039) cites Section 7602 of the Internal Revenue Code, which is entitled, "Examination of Books and Witnesses". From this reference one can only assume that this particular summons is issued under the authority of Section 7602. Nowhere on Form 2039 is there any reference to Section 7601. It is our contention that Section 7601 (see Appendix) cannot provide the IRS with any statutory authority for the issuance of the summons in this case.

However, when this case was appealed to the Sixth Circuit, the Government attempted to cite both Section 7601 and Section 7602 as authority to conduct the investigation proposed in this case. The Government has made the same argument in its brief to this Court (pages 6 & 9). The Government argues that Section 7602 merely elaborates and specifies some of the investigative powers granted to the Secretary in furtherance of the duties placed upon him under Section 7601(a).

In support of the argument that Section 7601 cannot be used as a basis for issuing summonses such as the one that was issued in this case, we cite the decisions of the Fifth and Sixth Circuits, both of which have recently ruled that Sections 7601 and 7602 are not coterminous.

In ruling on the *Bisceglia* case, the Sixth Circuit stated that Section 7601 did not give the Internal Revenue Service broad authority to issue IRS summons. The Court said,

> Section 7601, however merely "flatly imposes upon the Secretary the duty to convey and in-

quire." *Donaldson* v. *U.S.*, 400 U.S. 517, 523 (1971). Accordingly, we do not believe that Congress intended to provide in this section grounds additional to those specified in Section 7602 for the issuance of a summons. At p. 708-9 n. 3.

In *United States* v. *Humble Oil & Refining Company, supra,* the Fifth Circuit considered a situation where the IRS attempted to use a Section 7602 summons for the purpose of conducting a research project under Section 7601. The Court refused to permit the Internal Revenue Service to treat these two sections of the Code as supplements to each other. The Court said,

> Thus, we hold that the Internal Revenue Service is not empowered by Section 7602 to issue a summons in aid of its Section 7601 research projects or inquiries, absent an investigation of taxpayers or individuals and corporations from whom information is sought. Section 7602 simply cannot be read to give the IRS an unrestricted license to enlist the aid of citizens in its data gathering projects. At pp. 962-963.

Thus, we conclude that Section 7601 cannot be used as a basis to justify the issuance of a summons to determine the identity of a potential taxpayer. The only section of the Internal Revenue Code which can be used for this purpose is Section 7602. In other parts of this brief we have argued that the Internal Revenue Service has not satisfied the requirements of Section 7602 for the purpose of issuing the summons which the bank received.

The Government, in its brief filed with this Court (pages 20-22), has further attempted to find statutory

authority for the issuance of a "no name" summons in this case in the general administration and enforcement statutes of the Code, such as Sections 7801(a), 7802, 6201(a), and 6301. The Government had not sought to use these sections of the Internal Revenue Code as authority for the issuance of the summons in this case or in previous cases. We suggest that these very general statutes are even less relevant than Section 7601 to the scope of the authority of the Internal Revenue Service to issue a summons as part of a tax investigation. We maintain that these general statutes cannot be read to overcome the specific language contained in Section 7602 concerning the purposes for which the IRS may issue a summons.

D. Requiring the IRS Either To Identify the Taxpayer or To Specify that a Tax Liability Does Exist, Will Not Unduly Hamper the IRS in the Performance of Its Duties.

The Government has contended in its brief (page 8) that the ruling of the Sixth Circuit in this case "would seriously undermine the ability of the Internal Revenue Service to insure that all Federal taxes due are reported and paid". In the first instance, we find no information which would support the accuracy of that statement. In cases where the IRS has determined that, in fact, a tax liability does exist, it will be able to issue a summons even though it may not know the name of the taxpayer being investigated. See for example, *Tillotson* v. *Boughner, supra* and *United States* v. *Armour, supra.* Thus, the only situation in which the IRS might be restricted from conducting investigations is where the IRS obtains information concerning a particular transaction in which it does not know the name of the parties to the transaction, *and in which it can only sur-*

mise that a tax liability theoretically might be owing without any evidence of such liability.

Second, in spite of the statutory duties of the Internal Revenue Service concerning the collection of taxes due to the United States, it is clear that there are limitations placed on the authority of the IRS to use Section 7602 summonses to conduct tax investigations.

For example, the Fourth Amendment prohibition against unreasonable searches and seizures applies to every investigation by the Government, including administrative summonses issued by the Internal Revenue Service (See Part II, p. 21.) In addition, the Supreme Court has acknowledged that the recipient of a summons can resist its enforcement on the ground that the material is sought for the improper purpose of obtaining evidence in a criminal prosecution or for obtaining evidence that is protected by the attorney-client privilege. *Reisman* v. *Caplin*, 375 U.S. 440-449 (1964). Further, Congress did not give the IRS absolute authority to investigate the payment of income taxes without any restriction. Section 7602 specifies four particular purposes for which an examination may be conducted. That section *cannot* be read so as to infer that the IRS may make a tax investigation at any time, for any purpose, even though it is pertinent to the collection of taxes which *might* be due to the United States. Thus, the Government's statement that the IRS will be hampered in its ability to perform unless it can use the so-called "no name" summons virtually without limit to identify potential taxpayers is without merit.

II.

THE "NO NAME" SUMMONS ISSUED BY THE INTERNAL REVENUE SERVICE REQUIRING THE BANK TO PRODUCE RECORDS IS INVALID AND CONSTITUTES AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT

The first issue in this case involves the interpretation of the statute which authorizes the Internal Revenue Service to examine and/or summons records. We also urge that there are compelling constitutional limitations on the Secretary's authority to examine records. These limitations have been transgressed in the case of the "no name" summons served on the Commercial Bank, Middlesboro, Kentucky.

The courts have previously indicated that the principles of the Fourth Amendment apply to the investigations conducted by administrative agencies and, specifically, to the IRS summonses such as the one issued in this case. In *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 208 (1946), the Supreme Court indicated that the Fourth Amendment required that the Government particularly describe the material requested and that the material requested must be relevant to the inquiry being conducted. In discussing the applicability of constitutional safeguards to subpoenas for corporate records, this Court stated,

> . . . and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. At p. 208.

The principles of this Court's decision in that case were applied to an IRS summons in the case of *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir., 1967).

The relevancy requirement has been a long standing test of the validity of an IRS summons. The general rule is that bank records are relevant to tax investigations. See *United States* v. *First National Bank of Mobile*, 295 F.142 (S.D. Ala., 1924), *aff'd. without opinion*, 267 U.S. 576 (1925). However, the relevancy requirement has been clarified so that a more specific determination of relevancy must be made. Thus, the IRS may not investigate all of the records of a third party on the ground that such records are relevant to the tax liability of a given taxpayer. See for example, *Hubner* v. *Tucker*, 245 F.2d 35 (9th Cir., 1957), where the Court said,

> It has heretofore been held that, so far as a member of the general public is concerned, not a taxpayer, the privilege against an unreasonable search and seizure should be given great effect. Echoes of the American Revolution are found in this protest against a general warrant which permits the search and seizure of all the papers of an individual. We do not believe that, simply because some taxpayer may have had a grocery account entered upon the books of the grocer, the intention of Congress was to allow the Internal Revenue Service to investigate all the records of the grocer on the theory that some of them might be relevant to the inquiry of the tax status of another person. At p. 41.

We urge upon the Court the consideration that the relevancy test applied in *Hubner* v. *Tucker, supra,* which was recognized by this Court as one of the principal ingredients of the requirement that "the disclosure shall not be unreasonable" in *Oklahoma Press Publishing Company, supra,* is particularly applicable to the facts of the *Bisceglia* case. In *Hubner,* although the Government knew the identity of the taxpayer, it sought to examine all of the records of a third party on the theory that some of them might be relevant to the taxpayer's unsatisfied tax liability. The Ninth Circuit rejected the validity of this investigation on the ground that these records were not shown to be relevant and that therefore the investigation was unreasonable. In the instant case, *without* knowing the identity of the taxpayer, the Government sought to examine all deposit and cash tickets of every depositor who made a deposit in excess of a certain amount during a thirty-day period. We urge upon the Court that the extreme breadth of this inquiry should be held to be invalid on the ground that the deposit records of a large number of depositors other than the potential taxpayer have not been shown to be relevant to an investigation to establish the identity of a single taxpayer.

In *United States* v. *Harrington*, 388 F.2d 520 (2nd Cir., 1968), the Court of Appeals indicated that the appropriate test for relevancy was "whether the inspection sought might have thrown light upon the correctness of the taxpayer's return". It is also to be emphasized that the question of relevancy is not satisfied by a simple declaration by the Internal Revenue agent. See *Hubner* v. *Tucker, supra.*

As we discussed previously, we do not believe that the IRS has established any evidentiary connection between the deposits or exchanges of $40,000 in deteriorated $100 bills and the tax liability of any person. There is no foundation for the assumption that because the

bills are in a deteriorated condition they are unreported for tax purposes. The IRS is simply engaging in a fishing expedition in the hope of finding some tax liability which may or may not exist. Such a fishing expedition, without any demonstration of how these transactions relate to the non-payment of taxes or the correctness of a tax return, violates the relevancy requirement which is embodied in the Fourth Amendment prohibition against unreasonable searches by the Government.

We also urge that the summons was insufficient in its description of the information sought for the purpose of determining the identity of one potential taxpayer and that, accordingly, it has failed to meet the particularity requirement established in *Oklahoma Press Publishing Company, supra.* In *Bisceglia* the IRS sought to examine the deposit records of the bank for the period October 22 through November 13, 1970 (later modified by the District Court to cover the period October 16 to November 16, 1970). The bank received deposit tickets and/or cash tickets at the rate of approximately 1,800 to 2,200 tickets a day during that period. Even if it were possible to examine all of the bank's records during that period, there still may be no indication as to where the money came from. Further, the IRS nas not supplied any name or account number with which the bank might be more readily able to provide the information sought. As stated above, the breadth of this investigation covering the deposit records of a large number of bank customers clearly jeopardizes their right against unreasonable searches under the Fourth Amendment. Moreover, to request the bank to produce such a large volume of records to identify a single potential taxpayer would be to put an unreasonable burden on the bank. Such unreasonable burdens are prohibited by the Fourth Amendment.

Thus, we urge that the summons issued in this case is invalid and violates the Fourth Amendment prohibition against unreasonable searches, both on the ground that the Government has not established the relevancy of the records sought, and on the ground that the large number of records sought would jeopardize the constitutional rights of other bank customers and would impose an unreasonable burden on the bank.

CONCLUSION

The American Bankers Association respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit, and hold that the "no name" summons issued to the Commercial Bank of Middlesboro, Kentucky was invalid for the reasons stated in this brief.

Respectfully submitted,

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APPENDIX

Section 7601(a) and Section 7602 of the Internal Revenue Code of 1954

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) GENERAL RULE.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.